IOWA DEPARTMENT OF EDUCATION

(Cite as 27 DoE App. Dec. 965)

Gavin J.,	:	
Appellant,		DIA DOCKET NO. 17DOE001
	:	DOE # 5046
v.		
	:	**DECISION**
Iowa High School Athletic Association,		
Appellee.	:	

This matter was heard in person at the Wallace State Office Building on September 2, 2016, by 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").

The Appellant, Gavin J., was personally present. Also appearing were his mother, Tasha Sweet, and his maternal grandfather, Robert Jensen. The Appellee, Iowa High School Athletic Association [hereinafter, "IHSAA"] was represented by attorney Brian Humke. Also appearing for IHSAA were Executive Director Alan Beste and Assistant Director Todd Tharp.

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 of Education have jurisdiction over the parties and subject matter of this appeal.

The District seeks reversal of a decision that the IHSAA Board of Control ["Board"] made on August 4, 2016, finding that Gavin, a senior at Roland-Story Community High School is ineligible to compete in varsity interscholastic athletics for 90 consecutive school days under the provisions of the general transfer rule, 281—IAC 36.15(3).

At the hearing before the undersigned, Ms. Sweet, and Mr. Jensen testified on behalf of Gavin. Gavin chose not to testify in this hearing. Mr. Tharp testified for the IHSAA, which offered the following items into evidence:

- A recording of the hearing before the Board of Control;

[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, and he was not provided with any information regarding this appeal until after this appeal had been heard by the administrative law judge.

- Documents that had been made available to the members of the Board of Control, including a statement of facts, correspondence between the parties (regular and electronic mail), correspondence from two coaches employed by Roland-Story Community School District, Gavin's transcript of grades through the 2015-16 school year;
- Minutes of the meeting of the Board on July 29, 2016; and
- A copy of the decision of the Board signed by Chairperson Dave Herold and sent to Ms. Sweet on August 4, 2016.

All proffered documents and the recording were admitted into the record.

FINDINGS OF FACT

Ms. Sweet resides in the Roland-Story Community School District. Ms. Sweet has at all times had legal custody of Gavin. Her former husband, Gavin's father, resides in the Des Moines Public School District. Mr. Jensen also resides in the Roland-Story Community School District. It is undisputed that Gavin was enrolled at a treatment facility for children during the first semester of 9th grade (2013-14 school year). He was then a student at Roland-Story High School from second semester of 9th grade through first semester of his junior year (2015-16 school year). He enrolled for the second semester of his junior year at Southeast Polk High School. At that time, Gavin was living with his father, who misrepresented his place of residence as being the Southeast Polk Community School District. (Gavin should have been enrolled in the Des Moines Public School District, but that deception by his father has no bearing on this matter.) Gavin did not participate in sports during his one and only semester at Southeast Polk High School.

In May of 2016, after completing the semester at Southeast Polk High School, Gavin returned to the Roland-Story Community School District. He now resides roughly four nights per week with his maternal grandparents and the other three nights at his mother's residence. Those two residences are very close to each other. This is a new living arrangement for Gavin. As discussed later in this decision, Gavin lived solely with his maternal grandparents before moving in with his father. (Jensen Testimony; Sweet Testimony) He uses Ms. Sweet's address as his mailing address. (Sweet Testimony) Gavin became an adult just prior to the current (2016-17) school year. He wants to play varsity football for Roland-Story High School.

Gavin has had a rocky relationship with his step-father, Ms. Sweet's husband. But it would be a grave disservice to Gavin to not hold him responsible for many of his own behaviors, which have caused some of his removals from his mother's residence to medical facilities for adolescents. The undersigned administrative law judge agrees with Mr. Jensen that Gavin's issues in middle school and his freshman year should not be held against him, and those behaviors are not being held against him. But it is also ultimately not fair to Gavin to absolve him from responsibility on the basis that he is the child of a broken home or is merely a "typical teenager." To his great credit, Gavin himself did not shift any of the responsibility for his behaviors to anyone else. Although he did not testify, Gavin took his responsibility at this hearing as the Appellant seriously, and

presented himself in this hearing in an extraordinarily mature manner that demonstrated that he has clearly moved on from his earlier teenage years. If he takes nothing else from this matter, it is hoped that Gavin holds onto the very good impression he made at the hearing before this administrative tribunal.

Due to alleged abusive behavior by his step-father, to whom his mother is still married, Gavin was living with the Jensens, his maternal grandparents, until it was agreed by the family that Gavin would move in with his father prior to the second semester of the 2015-16 school year. Gavin and his father had had very limited contact with each other since his father left the family when Gavin was a very young child. Nevertheless, Gavin's move to his father's residence was with the blessing of Mr. Jensen, who believed that "nothing else was working." (Statement of Ms. Sweet during hearing before Board of Control) Nothing more was presented at either this hearing or the hearing before the Board of Control to explain why Gavin moved from the residence of the Jensens.

Before having Gavin move in with his father from his grandfather's home, Ms. Sweet spoke with Steve Schlatter, Roland-Story High School Principal, who informed her that Gavin would be ineligible for sports if he returned to Roland-Story High School from Southeast Polk High School. Mr. Schlatter reportedly did not give any specific timeframe for the length of the ineligibility period. (Statement of Ms. Sweet during hearing before Board of Control)

On or about April 20, 2016, Gavin had what he characterized as a "minor car accident" with a car owned by his father's girlfriend. His father's girlfriend had her own residence; it is not known whether Gavin had permission to operate her vehicle. The accident greatly angered Gavin's father, and the two had a physical altercation that night. Gavin called local law enforcement, who responded but who determined that no intervention by them was necessary.

After this altercation, Gavin's father chose to live with his girlfriend, for the most part leaving Gavin alone at his own residence. There was conflicting information about how Gavin sustained himself. At the hearing before the Board of Control, Gavin reported that his only source of food was one meal daily at McDonalds, courtesy of a friend. (Statement of Gavin J. during hearing before Board of Control) At this hearing, Ms. Sweet explained that she and her parents would provide Gavin with food, and that she was paying into his school lunch account so he could eat at school.

Neither Gavin, his mother, nor his grandfather provided an explanation as to why Gavin stayed at his father's residence alone. Certainly, it made academic sense for him to finish his semester at Southeast Polk, but he could have done that from the Jensens' residence if the situation with his father truly had been dire. No one addressed transportation, but it is noted that Gavin was already not living in the Southeast Polk School District.

Gavin finished the second semester of his junior year at Southeast Polk, and at the conclusion of the 2015-16 school year, returned to his maternal grandparents' home. Gavin is enrolled as a senior at Roland-Story High School. He does not have an IEP,

Individualized Education Program. That is, he received no special education or related services. (Sweet Testimony)

When the decision was made that Gavin would return to Roland-Story High School, Ms. Sweet contacted Todd Tharp of the IHSAA to ask for details regarding ineligibility. In conversations with Mr. Tharp, the family was informed that Gavin would be ineligible for 90 school days of varsity competition at Roland-Story upon his return to that high school because none of the exceptions to the transfer rule applied to him.

Before Gavin turned age 18, his mother filed a formal request on behalf of her son for immediate varsity eligibility at Roland-Story High School. On July 5, 2016, Mr. Tharp sent a letter to Ms. Sweet, ruling Gavin ineligible for immediate varsity competition because none of the exceptions to the transfer rule, 281—Iowa Administrative Code (IAC) 36.15(3), applied. Ms. Sweet exercised her right to a hearing before the IHSAA Board of Control.

One of the assistant coaches for Roland-Story sent an email to the IHSAA in which he implied that football was a motivating factor in Gavin's move back to the District. The family disavowed that email, and there is little evidence that it carried much weight with the Board of Control. Certainly, it carried no weight with the undersigned. For the sake of argument, it is assumed that Gavin did not move back to Roland-Story for the purpose of playing football. In his closing statement, which is not evidence, Gavin demonstrated that he has a good perspective on the place of football in his life. In his own words, football is just a part of Gavin's life. Gavin views the Roland-Story school district as a "second family" and finishing school with his second family was important to Gavin, and when he left his father's home he clearly left behind an unhealthy environment for him.

During that hearing, held on July 29, 2016, the Board heard from Gavin, his mother, and Aaron Stensland, head football coach at Roland-Story High School. The family asked that the Board reconsider Mr. Tharp's ruling. Other than the testimony about food and meals for Gavin noted above, the statements made by Gavin and his mother to the Board were consistent with the testimony of Ms. Sweet at this hearing. (DVD of Board of Control meeting)

The Board concluded that no exceptions applied under which Gavin could qualify for immediate eligibility to participate in varsity athletics. The Board's decision states in part as follows:

> Gavin's changes in residence appear to be due to his behavior and at least partially motivated by athletics. His behavior caused his mother to arrange for him to live with his father. There was no legal change in custody made at the time. Gavin testified that his father treated him horribly during the time he resided with him. However, he still remained with his father until the end of the semester. At that time, he returned to Roland to reside with his grandparents, not his mother.

> The motivation to transfer and enroll in another school need not be related to solely to athletics for the Board to deny eligibility. The Board of Control and Department has [sic] consistently declined to make an exception to the 90 school-day period of ineligibility in cases even where the motivating factor for the transfer was something other than sports. [Citation omitted.]

On August 15, 2016, Ms. Sweet filed a timely appeal with the Department of Education. Gavin has since attained age 18 and is an adult. Only he can pursue this appeal. In a conference call on the morning of August 26, 2016, Gavin confirmed that he wishes to be substituted as the Appellant in this matter.

At the hearing before this administrative tribunal, Mr. Jensen spoke of the benefits of participation in secondary athletics, including the development of teamwork and camaraderie. This is undeniably true, and is address in more depth later in this decision. Mr. Jensen also noted that the Department of Education values development of leadership skills in students and emphasizes help for students who need extra help.

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 Gavin Qualify For Immediate Participation in Varsity Athletics Under Any of the Exceptions To The General Transfer Rule?

The Iowa Legislature, in Iowa Code § 256.46, directed the State Board of Education to adopt rules to address eligibility of transfer students. The State Board of Education then promulgated and adopted the general transfer rule, 281—IAC 36.15(3). The Appellants urge that Gavin fits at least one of the following provisions:

> 36.15(3) General transfer rule. A student who transfers from a school … 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. …
>
> (4) Pursuant to Iowa Code section 256.46, s student whose residence changes due to any of the following circumstances is immediately eligible provided the student meets all other eligibility requirements…:
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> …
>
> 2. Placement in foster or shelter care.
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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)"a"(4)

The Board was correct to reject the argument that Gavin's residence with his maternal grandparents is a "pseudo foster care situation." Gavin's living arrangements are not pseudo foster care. He comes and goes as he pleases between his mother's and his grandparents' residences. He has not been removed by state action from the residence of either of his parent's. His transfer to Southeast Polk and then back to Roland-Story was not caused by an admission of Gavin into a treatment facility.

This appeal is not similar to *In re Evan P.*, 27 DoE App. Dec. 634 (2015), in which the student was admitted to a fairly long-term residential treatment facility. The Appellant argues that it makes no sense to make an exception for students who have been "sent to a correctional facility but not for his residing with his grandparents." (Affidavit of Appeal) The difference – and the reason it does make sense to differentiate between the situations

– is that family decisions to relocate a child *among different family members* can be misused to manipulate eligibility rules. In the case of Evan P., his parents make the painful decision to remove Evan from his family setting to a residential treatment facility. This is a crucial difference that cannot be overlooked by the undersigned.

The above distinction does not mean that Gavin's family relocated him among family members for undesirable reasons, but the end result is that Gavin's situation does not qualify for the placement in foster or shelter care exception.

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

281—IAC 36.15(3)"a"(8) is also known as the "catchall" or exceptional circumstances subrule. Again, the Board properly concluded that no exception should be made for Gavin under this subrule. 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).

"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). The purpose of the transfer rules does not require that athletics be the motivating factor for a transfer. The rules are purposefully broadly written because participation in interscholastic athletics is a privilege, not a right. *Brands v. Sheldon Community School*, 671 F.Supp. 627, 630 (N.D. Iowa 1987).

The Appellant equates his situation to that of the student in *In re Thor L.*, 27 DoE App. Dec. 530 (2014). That appeal was very different from the instant appeal. Thor L. was kicked out of his father's home and literally had nowhere else to go but his mother's home, and within minutes of being kicked out of his father's house, Thor L. called his mother to arrange for her to pick him up. The length of time Gavin stayed at his father's house after their relationship deteriorated demonstrates choice. In addition, Thor L. had done nothing to escalate a deterioration in the relationship with his father, whose actions were fueled by alcohol abuse. Without excusing or condoning the reaction of Gavin's father, it appears here that the triggering event for their bad relationship in the spring of 2016 was Gavin's damaging the car owned by his father's girlfriend. This appeal is more like *In re Wilmot W.*, 24 D.o.E. App. Dec. 145 (2006), in which immediate eligibility was denied a student who chose not to stay with his father in Minnesota but to move to his brother's residence in Iowa, although – as is true here – there was no overt mistreatment of Wilmot at his father's home.

The Appellant also cited *In re David M.*, 14 D.o.E. App. Dec. 17 (1996) in support of his argument that an exception should be granted to him due to a "significant and serious disruption of the family unit which causes a serious dysfunctioning of the family unit as a whole." The Department continued in that case as follows: "We believe the discussion [about disruption of the family unit] is instructive in that nearly if not all examples cited in support of a broad interpretation relate to <u>conditions beyond the student's control</u>, not

conditions of the student's own making or choosing." *In re David M.* at 21. [Emphasis in original.]

The transfer rules are presumptively valid. *United States ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 147 (8th Cir. 1982). They may be attacked successfully only by a showing that the governing authority – in this case, the IHSAA Board of Control – has applied the rules unreasonably. The undersigned conclude that the Board in no way abused its discretion when it refused to make an exception for Gavin under either 281—IAC 36.15(3)"a"(4) or (8).

Here, there is simply no evidence that Gavin was in danger of immediate and identifiable irreparable harm when he transferred back to Roland-Story. Gavin chose to stay at his father's residence weeks after the altercation between he and his father. This length of time demonstrates that it was Gavin's choice, his own decision, to remain at his father's. The length of time also demonstrates that there was no immediate and identifiable irreparable harm to which Gavin was subjected at his father's. Indeed, his father was largely, if not wholly, absent from the house the last part of April and all of May. The situation simply was not shown to be so dire that Gavin's best interests would be served by leaving Southeast Polk High School prior to the end of the semester. It bears repeating that Gavin gives every sign of having turned his life around. He has a good perspective on activities. He makes no excuses for his actions, and at this point in his life, no one should make excuses for him. In short, Gavin is a fine young man but there are no exceptions to the transfer rules that apply to his situation.

This decision should not be read to minimize the value of secondary activities. Being part of the Roland-Story High School football team is a goal of Gavin's, and he can still realize that goal by remaining part of the senior leadership program and/or by working with the team as a statistician or manager. Gavin has already enlisted in the military to serve our country upon his high school graduation. There is no better way for him to prepare himself to be part of something larger than himself than by asking Coach Stensland to allow him to serve in the capacity of a statistician or manager.

DECISION

For the foregoing reasons, the decision of the Board of Control of the Iowa High School Athletic Association that Gavin J. is ineligible to compete in varsity interscholastic athletics at Roland-Story High School for a period of 90 consecutive school days is **AFFIRMED**. 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 13th day of September, 2016.

Carol J. Greta
Administrative Law Judge

It is so ordered.

Ryan M. Wise

9-14-16
_____
Date

_____
Ryan M. Wise, Director
Iowa Department of Education