

**IOWA DEPARTMENT  
OF EDUCATION  
(Cite as 23 D.o.E. App. Dec. 329)**

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*In re Johannes Klein*

Notre Dame High School, Appellant,	:	
	:	
vs.	:	
	:	DECISION
Iowa High School Athletic Association, Appellee.	:	[Adm. Doc. #4622]

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This matter was heard telephonically on November 3, 2005, before Carol J. Greta, designated administrative law judge<sup>1</sup>, presiding on behalf of Judy A. Jeffrey, Director of the Iowa Department of Education.

The Appellant, Notre Dame High School [hereinafter, “the School”], was represented by attorney Michael Schilling; the Appellee, Iowa High School Athletic Association [hereinafter, “IHSAA”] by attorney Bruce Anderson. Also present for the School was Principal David Edwards and for the IHSAA, its Executive Director, Richard Wulkow.

An evidentiary hearing was held pursuant to departmental rules found at 281— IAC [Iowa Administrative Code] 6. Jurisdiction for this appeal is pursuant to Iowa Code § 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 School seeks reversal of a decision that the IHSAA Board of Control made on October 6, 2005, that Johannes is ineligible to compete in interscholastic athletics for 90 consecutive school days under the provisions of the general transfer rule, 281—IAC 36.15(3).

**I.  
FINDINGS OF FACT**

Johannes Klein is a soon-to-be 17 year old citizen of Germany who is living with his great-uncle in Iowa and attending school as a junior at Notre Dame High School, an

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<sup>1</sup> Judge Greta is the Iowa Department of Education’s liaison to the Board of Control of the Iowa High School Athletic Association, a non-voting position. She deliberately was not present when the IHSAA Board discussed and voted on this eligibility matter. Her membership on that Board was fully disclosed to the Appellant in writing prior to this hearing, as well as on the record at the beginning of the hearing.

accredited nonpublic member school of the IHSAA. It was averred without contention, but without offer of proof, that Johannes' great-uncle is also his legal guardian.

Johannes testified that he played club soccer in Germany. Mr. Wulkow acknowledged that secondary schools in Europe do not generally offer athletic teams as either co- or extra-curricular activities. Johannes was not exposed to American football until his arrival in Iowa this past August. Prior to this school year, Johannes had briefly been in the United States twice. He was in this country for two weeks to visit his brother, who was present on a student visa, and last year he and his club soccer team were in Cincinnati, Ohio to participate in a soccer tournament. Johannes is now in the U.S. on an **F-1 visa** for the purpose of attending the School for the 2005-06 school year.

Foreign and foreign exchange students are encouraged by Principal Edwards to participate in extra-curricular activities as a means of getting to know their classmates and getting a more complete taste of American life. Johannes logically believed that his skills on the soccer pitch would most easily translate to the football field.<sup>2</sup> He successfully tried out for the football team as a kicker. The School, which has an average enrollment of about 23 students per class, does not field a football team directly. It has a cooperative sharing agreement with West Burlington Public High School ["West Burlington"] pursuant to which West Burlington is the host school.<sup>3</sup> The team is known as the West Burlington Notre Dame ["WBND"] football team.

The School did not file an application for approval for foreign exchange student eligibility with the IHSAA until Johannes had participated in three varsity interscholastic football games. At that time the West Burlington superintendent read a local newspaper article about Johannes. The article led the superintendent to believe that Johannes was not a foreign exchange student with immediate eligibility to participate in interscholastic high school sports. He contacted Principal Edwards who then filed the required application for approval for foreign exchange student eligibility with the IHSAA.

Before the application was filed, the WBND football team played three varsity interscholastic competitions, losing one and winning two. Johannes participated in all three games; he testified that he kicked the winning field goal in one victory. When IHSAA management received the application for approval of Johannes as a foreign exchange student, it denied immediate eligibility to Johannes based on his status as a foreign non-exchange program student. It also ordered the WBND football program to forfeit its two victories from the contests in which Johannes had participated.

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<sup>2</sup> The parties agree that Johannes was not recruited to play football for the School, and that there was no undue influence at issue.

<sup>3</sup> Such agreements are authorized by Iowa Code section 280.13A ("If a school ... does not provide an interscholastic activity for its students, the ... school may complete an agreement with another school ... to provide for the eligibility of its students in interscholastic activities provided by that other school ... .")

The IHSAA Board of Control upheld the two decisions. The School appealed to the undersigned the eligibility ruling on behalf of Johannes. West Burlington, as the host school of the cooperative football program, did not appeal the forfeiture determination.

As an ineligible transfer student, Johannes could have continued to practice with his teammates, and could have participated in all non-varsity games.<sup>4</sup> Johannes testified that he was aware of this. However, he stated that he did not want to play at the junior varsity level and that he also chose to cease practicing with his teammates.

## II. CONCLUSIONS OF LAW

The School raises the following alternative arguments: (1) Johannes is not a transfer student, (2) Johannes should be treated as a foreign exchange student, and (3) the IHSAA Board of Control should have exercised its discretion to determine that extenuating circumstances were present by which to render Johannes eligible. All three arguments are subject to this agency's interpretation of the general transfer rule, 281— IAC 36.15(3), which states in pertinent part as follows:

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 281—subrule 12.1(8), exclusive of summer enrollment, unless one of the exceptions listed in paragraph 36.15(3) “a” applies. ...

a. Exceptions. The executive officer or executive board shall consider and apply the following exceptions in formally or informally ruling upon the eligibility of a transfer student and may make eligibility contingent upon proof that the student has been in attendance in the new school for at least ten days:

...

(4) Pursuant to Iowa Code section 256.46, a student whose residence changes due to any of the following circumstances is

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<sup>4</sup> This eligibility to participate at any non-varsity level competition was brought about by S.F. 423, enacted in 2005 by the Iowa Legislature. Prior to the enactment of S.F. 423, a transfer student could not participate in any level of interscholastic competition during the 90 school days of ineligibility. In *In re Hanno Jusek*, 21 D.o.E. App. Dec. 198 (2002), the host father of a foreign student present on an F-1 visa “made it clear that he is not asking that Hanno be granted an exception from the 90 consecutive school days of ineligibility. Rather, he and his wife are asking that Hanno be allowed to participate during the period of ineligibility in non-varsity level athletics, such as competing on the sophomore or junior varsity [football] teams.” Because the *Jusek* appeal predated S.F. 423, this agency reluctantly had to deny the request.

immediately eligible provided the student meets all other eligibility requirements in these rules and those set by the school of attendance:

...

3. Participation in a foreign exchange program recognized by the school of attendance.

...

(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.

#### *Is Johannes a Transfer Student?*

The argument that Johannes is not a transfer student because he did not transfer to the School from another IHSAA member or associate member school is not novel. It was raised most recently in *In re Joseph Curran*, 21 D.o.E. App. Dec. 224 (2002) and before that in *In re Ziyad Alwan*, 13 D.o.E. App. Dec. 177 (1995).

Ziyad Alwan was an Australian citizen attending Davenport North High School as a non-exchange foreign student. Joe Curran attended high school in South Dakota before enrolling at Sioux City Bishop Heelan High School without a contemporaneous parental change of residence. Both argued that they were not subject to the transfer rule because they were not transferring “from one school district to another school district” (*Alwan*) or “from one member or associate member school to another” (*Curran*). In *Curran*, this agency stated as follows:

The Elk Point-Jefferson school district in South Dakota is not a member or associate member of the IHSAA. However, the preamble of the general transfer rule that refers to member and associate member schools may not be viewed in isolation from the remainder of the rule, which refers to a “transfer student” and to “any transfer situation.” The Iowa Supreme Court has stated, “We do not consider one portion of a statute in isolation, but rather construe it in context with other portions of the statute.” *In the Interest of B.B.*, 516 N.W.2d 874, 878 (Iowa 1994). We know of no prohibition to application of this common sense guideline regarding statutory construction to agency rules. Our supreme court has stated specifically regarding such rules that

agencies are accorded “a reasonable range of informed discretion in the interpretation and application of their own administrative rules.” *Dameron v. Neumann Brothers, Inc.*, 339 N.W.2d 160, 162 (Iowa 1983).

When read as a whole, it is nonsensical to conclude that the transfer rules do not apply to students who transfer into Iowa from another state. Furthermore, it would be wholly inconsistent with our previous decisions to so conclude. **We hold that rule 281-36.15(3) does apply to students in Joe’s position who transfer to an Iowa school or school district from outside of this State without a contemporaneous change in parental residence.** [Emphasis added.]

In *Alwan*, we found it unnecessary to address that argument, concluding that Ziyad’s status as a foreign non-exchange student was the decisive factor. For the sake of educating all member and associate member schools, we choose to reiterate here that any transfer to an Iowa member or associate member school subjects the transferring student to our transfer rule.

Although not pursued at the appeal hearing before this agency, Principal Edwards argued in his communication to the IHSAA Board of Control that because Johannes was living with his legal guardian, he should be given relief from the transfer rule. As we have ruled previously, living with a guardian (even a court-appointed guardian) is not determinative of residency issues. *In re Brandon James Bergman*, 22 D.o.E. App. Dec. 130 (2003). Where a legal guardianship exists (and here there was no evidence that Johannes’ great-uncle was his court-appointed guardian), the IHSAA and this agency must rely on the transfer rule to determine eligibility.

*Should Johannes be Granted Eligibility as a Foreign Exchange Student?*

The exception in 36.15(3)“a”(4)“3” is authorized by Iowa Code section 256.46, which states in pertinent part, “The state board shall adopt rules that permit a child who does not meet the residence requirements for participation in extracurricular interscholastic contests or competitions ... to participate in the contests or competitions immediately if the child ... meets one of the following circumstances or a similar circumstance: ... the child is a foreign exchange student; ... .”

The School argues that being a foreign non-exchange student is a “similar circumstance to the explicit exception for a foreign exchange student. In the alternative, the School argues that it did not have fair notice of the difference between a foreign exchange student and a foreign non-exchange student.

If section 256.46 said only that a child has immediate eligibility if that child is a foreign exchange student or is in a similar circumstance, there would be at least a colorable issue. However, the list of qualifying circumstances in the statute include far more than being a foreign exchange student; included are the following:

- 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 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.

The circumstances regarding a child's family life – particularly the third bullet – can vary widely. It is reasonable that the Legislature would choose to keep the door open to situations not easily explained in a legal code. However, if the Legislature had intended to include non-exchange foreign students in the listing, it could have done so. The Iowa Supreme Court has recognized that “the legislature may regulate by omission as well as by inclusion. *Barnes v. Iowa Dep't of Transp.*, 385 N.W.2d 260, 263 (Iowa 1986). This is particularly true when certain conditions of entitlement are listed and others are not. *Id.*; *In re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972); *Iowa Steel Co. v. Staley*, 253 Iowa 355, 357, 112 N.W.2d 364, 365 (1961).” *Bob Zimmerman Ford, Inc. v. Midwest Automotive I, L.L.C.*, 679 N.W.2d 606, 610 (Iowa 2004)

Indeed, there have been many appeal cases before this agency involving foreign students with F-1 visas who have been denied immediate eligibility. *See, e.g., In re Ziyad Alwan, supra; In re Hanno Jusek*, 21 D.o.E. App. Dec.198 (2002); *In re Ramy Younes*, 22 D.o.E. App. Dec.10 (2003). If the Legislature desired to change the statute, we assume it would have done so. In the meantime, the Legislature has chosen to draw a bright line between foreign students who are present in this country on J-1 visas and those who are present on F-1 visas.

Pursuant to federal law (states do not issue visas; therefore, they may not define the types of visas), J-1 visas are limited to foreign students who participate in approved exchange programs. 8 U.S.C. section 101(13); 22 C.F.R. sections 62.1, 62.25. On the other hand, foreign students on F-1 visas are in the United States legally, but are not *exchange* students. 22 C.F.R. section 62.1(b). The policy decision of the Iowa Legislature is to grant immediate eligibility only to those with the J-1 visa.

As to the contention that IHSAA's handbook does not clearly explain the difference between a foreign exchange student and a non-exchange student, the difference appears in federal law. The IHSAA repeats the transfer rule in its handbook, but that organization did not adopt the transfer rule. That rule and all other Department of Education rules was adopted by the State Board of Education. This agency has kept schools apprised of the difference between the F-1 and J-1 student visas. A set of Frequently Asked Questions (FAQs) is published on the department's web site dealing with the difference. The existence of the FAQs has been highlighted in School Leaders Update, a monthly newsletter sent electronically to the administrators of school districts and accredited nonpublic schools. The following appears as a Question-and-Answer on the web site<sup>5</sup>:

**QUESTION:** What are the rules about participation in interscholastic athletics and where are those rules?

**ANSWER:** Iowa Code section 256.46 states that a foreign exchange student is immediately eligible to participate in interscholastic athletics if the student is enrolled in an Iowa school or school district and is otherwise eligible to participate (i.e., age, academics, good conduct, etc.). Only those students here on J1 visas are foreign exchange students. This is not true of a non-exchange foreign student. If a non-exchange student (typically on an F1 visa) is in a school or school district without his or her family, the student is ineligible to compete in interscholastic athletics for 90 consecutive school days. See also 281—Iowa Administrative Code 36.15(3). The 90-day period of ineligibility applies only to interscholastic sports. It does not apply to interscholastic speech or music competitions.

It is disingenuous for the School to suggest that it did not have adequate information by which it could have discerned the difference between a student with an F-1 visa and a student with a J-1 visa. It was aware of both types of visas; indeed, the School presently has enrollees with both types of visas.

*Did the IHSAA Board err in not Exercising Subrule 36.15(3) "a"(8)?*

As a last resort, the School argues that the Board of Control should have considered eligibility for Johannes pursuant to subrule 281—36.15(3)“a”(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. ...”)

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<sup>5</sup> The URL for this set of FAQs is: <https://www.edinfo.state.ia.us/web/faqs.asp?f=fes>.

The flaw in this argument is that Johannes' situation is addressed directly in the earlier part of the transfer rule. Where the Legislature has made a policy determination that only foreign *exchange* students are to be considered for immediate eligibility, neither the IHSAA nor this agency has the authority to override that determination.

**III.**  
**DECISION**

For the foregoing reasons, the October 6, 2005 decision of the Board of Control of the Iowa High School Athletic Association that Johannes Klein is ineligible to compete in interscholastic athletics at Notre Dame 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.

\_\_\_\_\_  
Date

It is so ordered.

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Carol J. Greta, J.D.  
Administrative Law Judge

\_\_\_\_\_  
Date

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Judy A. Jeffrey, Director  
Iowa Department of Education