

**IOWA DEPARTMENT
OF EDUCATION
(Cite as 22 D.o.E. App. Dec. 130)**

<i>In re Brandon James Bergman</i>	:	
James and Karen Wareham, Appellants,	:	
vs.	:	DECISION
Iowa High School Athletic Association, Appellee.	:	[Admin. Doc. 4551]

This matter was heard on September 18, 2003, before Carol J. Greta, designated administrative law judge¹, presiding on behalf of Ted Stilwill, Director of the Iowa Department of Education.

Appellant James Wareham was present telephonically for the hearing on behalf of his ward and grandson, Brandon James Bergman [hereinafter, “Brandon”], as was Brandon himself. Mr. Wareham was represented herein by attorney Joseph Heidenreich. The Appellee, Iowa High School Athletic Association [hereinafter, “IHSAA”] was represented telephonically by its Assistant Executive Director, Richard Wulkow, and by its attorney, Bruce Anderson.

An evidentiary hearing was held pursuant to departmental rules found at 281— Iowa Administrative Code chapter 6. Jurisdiction for this appeal is pursuant to Iowa Code § 280.13 and 281—IAC 36.17. Appellants seek reversal of a decision of the Board of Control of the IHSAA made on August 28, 2003, that Brandon is ineligible for 90 school days to compete in interscholastic athletics following his transfer to the Odebolt-Arthur Community School District from a secondary school in the State of Texas.

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.

**I.
FINDINGS OF FACT**

Brandon, whose date of birth is April 27, 1986, is the son of Craig Bergman and Debra Bergman, who divorced in 1998. The pertinent portion of their divorce decree was provided to this agency. It shows that Craig and Debra have joint custody of Brandon

¹ 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 in that Board was fully disclosed to the Appellants in writing prior to this hearing.

and his younger sister, Amber (now 11 years of age), with Craig having primary physical custody of Brandon and Debra having primary physical custody of Amber. To the best of Brandon and Mr. Wareham's knowledge, the decree has never been modified. The Warehams are the parents of Debra.

Craig and Debra reside a few miles from each other in the same school district in Texas. Brandon and Mr. Wareham both testified that, notwithstanding the terms of the divorce decree, Brandon has spent more time residing in his mother's household than that of his father. Craig, who has not remarried and does not cohabit with any other adult, works long hours for Nokia Corporation and travels extensively overseas on business. His long business-related absences from the home are not a new phenomenon; they pre-date the divorce. Brandon testified that if his father worked closer to a 40-hour week, he would live with him full-time.

In November of 2002, Debra invited an adult male to cohabit with her, Brandon, and Amber. Brandon and his grandfather testified that this man is a man of "bad habits." Brandon stated that he had a confrontation with the man around Christmas, resulting in Brandon moving out of Debra's house. Brandon has not resided with Debra since then. Amber continues to reside with her mother and her mother's cohabitant.

As was the pattern for many years, once school was over for the school year, Brandon traveled to Iowa to spend the summer with Mr. and Mrs. Wareham. He testified that the decision was made in July of 2003 that Brandon would remain with his maternal grandparents and would enroll in the Odebolt-Arthur High School for his senior year. The Warehams, who reside in the Odebolt-Arthur Community School District, were recently appointed Brandon's guardians in a voluntary guardianship proceeding in the Iowa District Court for Sac County.

The evidence shows that Brandon is a good student and a good citizen. He was a member of the football team at his high school team in Texas, but saw little playing time. Both parties agree that Brandon's transfer to Odebolt-Arthur was not motivated by academics or athletics.

II. CONCLUSIONS OF LAW

The Iowa State Board of Education has adopted rules regarding student interscholastic athletic eligibility pursuant to the authority in Iowa Code section 280.13. Those rules are found in 281—Iowa Administrative Code [IAC] chapter 36. An intergovernmental agency agreement allows IHSAA to interpret and enforce these rules, subject to appeal to the Director of the Department of Education. The decision rendered herein is to be based on the laws of the United States and the State of Iowa, the regulations and policies of the Iowa Department of Education, and shall be in the "best interest of education." 281—IAC 6.17(2). The decision of the Director is final. 281—IAC 36.17.

This case is governed by the general transfer rule in 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 complete in interscholastic athletics for a period of 90 consecutive school days ... 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 ... :

(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. ...

...

(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... .
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.

...

(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. ...

None of the exceptions listed above fits these facts. Although the Appellants argue that this case is the same as if Brandon were placed in foster or shelter care, we cannot stretch the statute, Iowa Code section 256.46, that far. The statutory language is not ambiguous or capable of a dual meaning; therefore, we give it its plain and ordinary meaning. *Iowa West Racing Ass'n v. Iowa Racing and Gaming Com'n*, 546 N.W.2d 898, 900 (Iowa 1996). Brandon prefers not to live with his custodial parent, Craig, because of Craig's work hours. He refuses to live with his noncustodial parent, Debra, because of conflict with her cohabitant. Therefore, he lives with his maternal grandparents, who have legal guardianship of his person.² This arrangement, while very sensible under the circumstances, does not place Brandon in foster care or shelter care.

We do not question that living with the Warehams may be in Brandon's best interests. However, Brandon does not reside with the Warehams because he is incapable of residing with either his custodial or noncustodial parent. It is the choice of the family for Brandon to be where he is. That this is the best choice for Brandon under the circumstances does not negate the fact that other choices (albeit less desirable in Brandon's eyes) were available. In prior cases, this agency has stated that an exception to the general rule of ineligibility should be made only where there has been a "significant and serious disruption of the family unit which causes a serious disfunctioning of the family unit as a whole." *In re David Miller*, 14 D.o.E. App. Dec. 17, 21(1996), quoting *In re Scott Anderson*, 1 D.P.I. App. Dec. 280, 282(1978). Here, it cannot be said that the "disruption factor" has been met when Brandon's younger sister is still in the household of Debra³ and when Craig's work hours have been stable since prior to the divorce.

² Guardianship is not determinative of transfer issues. In *In re Steven John Duncan*, 1 D.P.I. App. Dec. 117 (1976), this agency recognized that guardianships are relatively easy to obtain on behalf of a minor ward.

³ Mr. Wareham testified that he would like to change Amber's living arrangements but "can't" do so. No evidence was presented that Amber is not safe, happy, and well-cared for in her mother's household. Brandon testified that, to his knowledge, no custody modification proceedings are pending.

The transfer rules within 281—IAC chapter 36 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). Even though there is no question here that Brandon’s transfer has nothing to do with athletics, this does not negate the validity of the transfer rule. This agency consistently has declined to make an exception to the 90 school day period of ineligibility in cases where the motivating factor was something other than sports. *In re Erin Kappeler*, 17 D.o.E. App. Dec. 348 (1999) (greater academic opportunities); *In re R.J. Levesque, supra*, (peer harassment); *In re Scott Halapua*, 13 D. o.E. App. Dec. 394 (1996) (personality conflict with former coach).

While the general transfer rule has not been interpreted by an appellate court in Iowa, a similar transfer rule was the subject of *Indiana High School Athletic Assn., Inc. v. Avant*, 650 N.E.2d 1164 (Ind. App. 1995), in which the Indiana Court of Appeals stated as follows:

The Transfer Rule is designed to eliminate school jumping and recruitment of student athletes. Transfers not accompanied by a change in residence (or falling outside the 13 exceptions) are suspect in that they are subject to substantial manipulation. The Transfer Rule deters unscrupulous students and parents from manufacturing all sorts of reasons for a transfer, thereby faintly disguising athletically motivated transfers. The distinctions between these classifications are reasonably related to achieving the IHSAA’s purpose in deterring school jumping and recruitment.

Id. at 1170.

The majority of courts, including the federal courts in Iowa, have ruled that there is no “right” to participate in interscholastic athletics [*Brands v. Sheldon Community School*, 671 F.Supp. 627 (N.D. Iowa 1987); *Gonyo v. Drake University*, 837 F.Supp. 989 (S.D. Iowa 1993)]. Therefore, it cannot be successfully argued that any student is harmed by his or her ineligibility to compete. Brandon is allowed by the rules to practice with the team and enjoy the camaraderie of his teammates. He may be with the team on the sidelines during a game and may even contribute to the team effort as, for example, a statistician. He simply may not compete with and for his teammates during interscholastic competitions during his period of ineligibility.

III. DECISION

For the foregoing reasons, the August 28, 2003 decision of the Board of Control of the Iowa High School Athletic Association that Brandon James Bergman is ineligible to compete in interscholastic athletics at the Odebolt-Arthur Community School District 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

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

It is so ordered.

Date

Ted Stilwill, Director
Iowa Department of Education