IOWA DEPARTMENT OF EDUCATION

[redacted] DoE App. Dec. [redacted]

In re Raquel D.

Scot and Sherry D., Appellants,	:	DIA DOCKET NO. 17DOE005
	:	DE # 5057
v.	:	**DECISION**
Iowa Girls High School Athletic Union, Respondent.	:	

STATEMENT OF THE CASE

This matter was heard at the Wallace State Office Building in Des Moines on January 5, 2017, before Emily Kimes-Schwiesow, designated administrative law judge with the Iowa Department of Inspections and Appeals Division of Administrative Hearings, presiding on behalf of Ryan M. Wise, Director of the Iowa Department of Education ("Department").

Attorney Rush Nigut represented the Appellants, Scot and Sherry D., who were also personally present. The Appellants are the parents of Raquel D. Appellant Scot D. testified. Marcy Shrum, and Bruce Buchanan also testified on behalf of the Appellants. The Respondent Iowa Girls High School Athletic Union ("IGHSAU") was represented by attorney Brad Epperly. Also appearing and testifying on behalf of IGHSAU was its Executive Director, Jean Berger.

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 Appellant seeks reversal of a decision that the IGHSAU Board of Directors made as a result of a hearing before it on December 7, 2016, finding that Grand View Christian student Raquel D. is ineligible to compete in varsity interscholastic athletics for 90 consecutive school days under the general transfer rule, 281—IAC 36.15(3).

In addition to the testimony noted above, the administrative record before the undersigned consisted of the written decision of the IGHSAU Board of Directors, the affidavit of appeal from Scot D., IGHSAU exhibits 1 – 4 and Appellant exhibits A – S.

FINDINGS OF FACT

Raquel D. is a senior at Grand View Christian (GVC). This present school year, 2016-17, is her first year of attendance at GVC. The previous three school years she was a student at Iowa Christian Academy (ICA).

Raquel has multiple mental health diagnoses as well as a learning disability. (Exhibit B) She attended Waukee public schools from kindergarten through eighth grade where she had an individualized education program (IEP). (Exhibit A) She transferred to ICA beginning her ninth grade year. ICA is a private school that was unable to accommodate Raquel's IEP. Her parents determined at that time that a smaller school would be beneficial for Raquel regardless of the loss of her IEP. She received assistance from a certified educational therapist, and extra help from her math teacher outside of regular class time while attending ICA. (Scot D. Testimony) Raquel did well in ninth grade. However, as academic work became more challenging, her performance declined and she began to miss more school. (Exhibit M) In eleventh grade, Raquel was hospitalized after her performance in Algebra II triggered suicidal threats. (Exhibit N; Scot D. testimony) ICA requires completion of chemistry. Due to the math component involved in chemistry, and Raquel's struggle with math as a trigger for mental health crisis, her parents were concerned. During the second semester of her junior year, Raquel's parents began researching options for a transfer. Their primary concern was Raquel's mental health and wellbeing. (Scot D. testimony)

GVC is a private school which, similar to ICA, is unable to implement an IEP. GVC did establish a 504 accommodation plan for Raquel, and waived the chemistry course requirement. (Exhibit O; Exhibit 3) Raquel's father testified that the transfer to GVC was essential for her mental health and wellbeing. He acknowledged, however, that she would not have transferred to GVC if they did not have a basketball program. (Scot D. testimony) Basketball has been an important part of Raquel's life. She is talented player, and her participation is a valuable self-esteem booster and social experience. (Exhibit N)

Numerous emails were exchanged regarding Raquel D.'s transfer. Scot D. communicated via email with the registrar at ICA, Angel Melvin, about Raquel's potential transfer on May 9, 2016. At that time, Scot D. indicated a transfer to GVC was doubtful because Raquel would be unable to play basketball until January 10, 2017. (Exhibit 4) The next day, Scot D. reached out to then IGHSAU executive director, Mike Dick, to enquire about a waiver of the transfer rule. In this email Scot D. erroneously indicated GVC could accommodate an IEP. (Exhibit I) Mr. Dick explained that exception #7 to the transfer rule, 281 IAC 36.15(3)(a)(7), would only apply if Raquel D. was classified as a special education student with an IEP, ICA agreed and verified it does not offer the needed services, and GVC verified they do have the appropriate program. He emphasized that the district of residence would have to agree for the exception to apply. (Exhibit 2) On May 11, 2016, Scot D. indicated in another email to Angel Melvin that he believed Raquel would be at ICA the following school year and requested her transcript and a letter for the IGHSAU stating that ICA does not have a resource teacher on staff to support an IEP and/or 504 plan. (Exhibit 4) On July 11, 2016, Sherry D. sent

a request to Ms. Melvin for a "letter stating that ICA requires chemistry, requires Spanish (and it is online only) and that ICA has no resource teacher on staff." (Exhibit K) On July 21, 2016, Brenda Hillman, administrator at ICA, responded with the following relevant language, "No letter is necessary. ICA supports the responsibility and right of a parent to make decisions that are best for their child." (Exhibit 4)

Raquel D. enrolled at GVC in August 2016. On November 16, 2016, Jean Berger, current executive director of the IGHSAU, determined the transfer rule did apply and Raquel was ineligible for varsity level competition in interscholastic sports at GCA for the first 90 days of the present school year. (Exhibit 1) The Appellants exercised their rights to a hearing before the IGHSAU Board of Directors, which took place on December 7, 2016. The Board upheld the decision made by Ms. Berger on December 14, 2016. (Exhibit Q)

At hearing, Ms. Berger explained further that the IGHSAU and its Board based its decision on the totality of the following circumstances:

- ICA contends they can provide necessary services for Raquel D.
- GCV has waived the chemistry course requirement, but this is not part of Raquel's 504 accommodation plan.
- Motivating factors were examined and there was evidence that basketball was indeed a factor. Multiple emails in evidence regarding the transfer rule document basketball was a consideration.
- Raquel voluntarily left a school where she had an IEP to attend ICA where she did not have one.

(Berger Testimony)

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 IGHSAU Board of Director's application of the transfer rule to Sarah 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).

General Transfer Rule

Pursuant to its authority in Iowa Code § 256.46, the State Board of Education promulgated and adopted the general transfer rule, 281—IAC 36.15(3). The Appellants argue that the following exceptions apply to their daughter:

> 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. ...
> a. Exceptions. ...:
>
> > (7) A special education student whose attendance center changes due to a change in placement agreed to by the district of residence is eligible in either the resident district or the district of attendance, but not both.
> >
> > (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.

The Appellants' position is that exception #7 is applicable to all special education students without any requirement for either an IEP or a 504 accommodation plan. They contend Ms. Hillman's July 21, 2016 email constitutes ICA's agreement for purposes of the exception.

The Appellant misinterprets the rule. The exception is only applicable to students classified as special education students with an IEP. The term "placement" is significant. Educational placements for children with a disability are determined annually based on the child's IEP and proximity to their home. 281 IAC 41.116. Raquel did not have an IEP at ICA, and does not have one at GVC. Her transfer to GVC was not a change in educational placement as defined by rule. Additionally, an IEP is not equivalent to a 504 accommodation plan. Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. § 794) is a nondiscrimination law that provides individuals with disabilities access to, among other things, programs offered by schools that receive federal funding. *See In re Chase S.*, 22 D.o.E. App Dec. 136 (2003). The Department has provided guidance on

this topic explaining that "the purpose of a 504 accommodation plan is to put the student on equal footing with the student's non-disabled peers, whereas an IEP is for students for whom a level playing field is not the expected outcome."[1] Further, as noted by the Department in *In re Chase S.*, the mere existence of an IEP is not determinative. The IEP must state that participation in sports is required because it will benefit the student educationally in some way. *Id.* Finally, the exception indicates the change in placement is agreed to by the district of residence and district of attendance. In this case, both ICA and GVC are private schools, they are not public school districts subject to compliance with the Individuals with Disabilities Education Improvement Act (IDEA). The IDEA ensures children with disabilities receive free appropriate *public* education (FAPE) that meets their unique needs. 20 USC § 1400 et seq. It requires an IEP be written for students with a disability receiving special education services. *Id.* In this case, ICA maintains it can meet Raquel's academic needs. Regardless of their position, the exception is simply inapplicable to private schools that do not fall under the requirements of the IDEA. Raquel clearly does not meet exception #7.

Appellants next urge the applicability of exception #8. They contend Raquel's transfer to GVC was not a voluntary choice. They argue that her mental health diagnoses are so significant that the risk to her health by staying at ICA in fact forced her to transfer to GVC. Appellants' cite *In re Thor L.*, 27 D.o.E. App. Dec. 530 (2014) in support of their argument.

It is noted that testimony regarding the nature of Raquel's psychiatric disorders from Bruce Buchanan was not presented before the Board on December 7, 2016. The Board was in receipt of Raquel's psychological evaluation, a letter from her therapist, Ms. Shrum, and heard testimony from Ms. Shrum. Additionally, Scot D. testified in greater detail regarding Raquel's history of self-harm and suicidal threats at hearing than he previously did before the board. The Board properly based its decision on the evidence presented to them on December 7th.

The analysis comes down to whether the Board abused its discretion in deciding that an exception should not be granted to Raquel. The undersigned concludes that the Board did not abuse its discretion when it refused to grant an exception to Raquel under 281—IAC 36.15(3)"a"(8).

The Board properly reviewed Raquel's motivating factors for transfer as required. Academic services were clearly a motivating factor for the transfer. The Board accepted this as the primary factor. However, the current urgency to attend a school that could accommodate a 504 or IEP was questioned in light of Raquel's past transfer out of a school where she had an IEP into a school without one. The present transfer still does not provide her with an IEP. Her diagnoses, while certainly serious, have not changed during her attendance at ICA. What has changed is the difficulty of the academic courses as she advanced in grade level. There is no dispute that Raquel has struggled to cope with

[1] https://www.educateiowa.gov/resources/laws-and-regulations/legal-lessons/athletic-elibigility

academic course work and has been hospitalized in the past due to her mental health. The most significant academic change for Raquel by transferring to GVC is the waiver of a chemistry course, a factor that is not part of her 504 accommodation plan. Athletics, basketball in particular, is also a factor. Ms. Berger explained this was evidenced by the email correspondence of Scot D. regarding the applicability of the transfer rule prior to a decision to transfer. Furthermore, at hearing, Scot D. confirmed that if GVC did not have a basketball program Raquel would not have transferred there.

The applicable subrule required 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 totality of these circumstances do not lead to a conclusion that Raquel's choice to transfer to GVC was involuntary as the Appellants contend. *In re Thor L.*, is distinguishable from the present case. Thor was literally kicked out of his father's home, leaving the child with no option but to move in with his mother who resided in a different school district. *See In re Thor L.*, 27 D.o.E. App. Dec. 530 (2014). Raquel had every right to transfer to GVC, but the totality of the evidence did not support immediate eligibility for her transfer to another high school. Her transfer of schools appears to be motivated by academics, her mental health, or athletics, or a combination of the three. Thor did not have any option other than transfer. That is not the case for Raquel, as her father acknowledged, she would not have chosen to transfer to GVC if a basketball program was not available.

"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 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 IGHSAU Board of Control – has applied the rules unreasonably.

Here, the IGHSAU Board did not erroneously or unreasonably apply the general transfer rule to determine that Raquel D. is ineligible to participate in varsity interscholastic athletics for a period of 90 days. There was no abuse of discretion; the decision must be affirmed.

DECISION

For the foregoing reasons, the December 14, 2016 decision of the Board of Directors of the Iowa Girls High School Athletic Union that Raquel D. is ineligible to compete in varsity interscholastic athletics at Grand View Christian 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 fact shall be so considered.

Dated this 11th day of January, 2017.

Emily Kimes-Schwiesow
Administrative Law Judge

It is so ordered.

1-11-17
Date

Ryan M. Wise, Director
Iowa Department of Education