

**IOWA STATE DEPARTMENT
OF EDUCATION**
(Cite as 21 D.o.E. App. Dec. 198)

In re Hanno Jusek

Dwight & Jane Dial,
Appellants,

v.

Iowa High School Athletic
Association, Appellee.

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DECISION

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[Admin. Doc. #4518]

The above-captioned matter was heard telephonically on September 23, 2002, before Carol J. Greta, designated administrative law judge, presiding on behalf of Ted Stilwill, Director of the Iowa Department of Education.

Appellant, Dwight Dial, was present for the hearing on behalf of his wife, Jane Dial, and their ward, Hanno Yusek. Appellee, Iowa High School Athletic Association [hereinafter, "IHSAA"] was represented by its Executive Director, Bernie Saggau. Neither party was represented by counsel.

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 Iowa Administrative Code 36.17. Appellants seek reversal of a decision of the Board of Control of the IHSAA made on September 4, 2002, that Hanno is ineligible under the provisions of 281 Iowa Administrative Code chapter 36 to compete in interscholastic athletics for 90 consecutive school days following his entry into Southern Cal school district.

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**

Hanno, who will be 18 years of age on October 13, 2002, is a citizen of Germany. He transferred to Southern Cal school district for the 2002-2003 school year from his home country, but is not a participant in a foreign exchange student program. Rather, he was familiar with the Dials through family connections. Hanno's cousin, Ingmar, had been hosted by the Dial family for six months of the 1995-1996 school year through a student foreign exchange program. Three years after that experience, the Dials traveled to Germany to meet Ingmar's family, where they also became acquainted with Hanno and his parents. By this time, Hanno's sister had also been a participant in a foreign exchange program (spending the better part of a year in Boston as her experience).

While in Germany, the Dials were asked by Hanno's parents whether they would be willing to be a host family for Hanno. According to Mr. Dial's testimony, Mr. and Mrs. Jusek, who are instructors in Germany, highly value the cultural experience that a foreign exchange program can produce for the participating student. It was agreed that Hanno would spend a few weeks during the summer of 2000 with the Dials at their home in Lake City, Iowa, as a "trial period" to make sure that a longer stay would not be unpleasant for either the hosts or their guest.

The trial visit was a success, and it was agreed that Hanno would spend an entire school year with the Dial family, who reside in the Southern Cal school district. Both the Juseks and the Dials desired to avoid the expense of a foreign exchange program (reportedly \$5800, exclusive of airfare); therefore, the families directly arranged with all appropriate government agencies for Hanno to receive an F-1 visa and to live with the Dials. After a lengthy process and much paperwork, Hanno arrived in Iowa in mid-August, 2002. He will stay with the Dials, who, according to Mr. Dial's testimony, have legal guardianship of Hanno, until June 28, 2003, when he will return to Germany.

According to the Dials, Hanno "showed a strong interest in participating in the extracurricular activities" offered by Southern Cal, and "decided on football as his fall sport." The Dials and Hanno shortly learned from the district's athletic director that Hanno would not have immediate eligibility to participate in football or any other interscholastic athletics because he is not at Southern Cal pursuant to a foreign exchange program.

Mr. Dial also testified that he was told by Southern Cal school district personnel that if tuition were paid on behalf of Hanno to Southern Cal, Hanno would have immediate eligibility to participate in interscholastic athletics. Mr. Saggau, in his testimony on behalf of the IHSAA, clarified for Mr. Dial that this is incorrect. Hanno's eligibility is not contingent in any way upon whether he attends Southern Cal by payment of tuition or not. It would appear from the fact that Hanno's visa is of F-1 status that the district must charge tuition for him, but that is not an issue for this appeal.¹

At the hearing, Mr. Dial 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 teams. This is an issue of first impression for this agency.

¹ The visa status of F-1 is issued to a resident of a foreign country "who is a bona fide student ... who seeks to enter the United States temporarily and solely for the purpose of pursuing ... a course of study..." 8 U.S.C. section 1101(a)(15)(F). [Emphasis added.]

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 IAC chapter 36. An intergovernmental agency agreement allows IHSAA [and its counterpart for females, the Iowa Girls High School Athletic Union] to interpret and enforce these rules, subject to appeal to the Director of the Department of Education.

IHSAA relied on 281 IAC 36.15(3), the General Transfer Rule, when it determined that Hanno is ineligible to compete at Southern Cal for 90 consecutive school days. The rule states, in 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 ... 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:

...

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

Before addressing the varsity/non-varsity issue, we briefly speak to the exceptions in the foregoing rule. There is no question that Hanno is in the Southern Cal district without his parents. Therefore, subrule "a"(1) is inapplicable. In addition, no one is

claiming that Hanno is in this country as a participant of a foreign exchange program, the exception under subrule “a”(4)“3”. And while the legal guardianship established for Hanno with the Dials certainly is wise, giving the Dials authority to make educational and medical decisions on behalf of Hanno, the guardianship does not establish Hanno as a resident of the Southern Cal district.²

This leaves the issue whether the IHSAA or this agency has the authority to allow Hanno to participate in interscholastic athletics at a non-varsity level during his period of ineligibility.

The general transfer rule above does not distinguish between varsity and any other level of competition. The rule merely states that, absent an exception provided for in the rules, a transfer student “shall be ineligible to compete in interscholastic athletics for a period of 90 consecutive school days.” 281 IAC 36.15(3). Nor does the applicable statute, Iowa Code section 256.46, make such a distinction. That Code section states in pertinent part as follows:

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 sponsored or administered by an organization as defined in section 280.13* to participate in the contest or competitions immediately if the child ... is a foreign exchange student... .

[Emphasis added.]

The Iowa High School Athletic Association and the Iowa Girls High School Athletic Union are the organizations defined in Iowa Code section 280.13. There are non-varsity contests or competitions that are sponsored or administered by these organizations. It cannot be said that the present wording of section 280.13 refers to only varsity competitions and contests. Therefore, the law – as currently written – does not give relief to Hanno and to other students similarly situated. We cannot read into the law what the lawmakers did not include themselves. It is a firm rule of statutory construction that, had the legislature intended to allow students who are otherwise eligible to participate (by virtue of their academics and their behavior) at any non-varsity level during the transfer rule 90 school day period of ineligibility, the legislature would have so acted. Legislative intent is expressed by omission as well as by inclusion. *Wiebenga v. Iowa Department of Transportation, Motor Vehicle Division*, 530 N.W.2d 732, 735 (Iowa 1995).

² Iowa Code section 282.6 defines a “resident” of a school district, for purposes of determining whether school is to be free of tuition, as a person who is physically present in the district for the purpose of making a home and not solely for school purposes. The evidence established that Hanno is in the Southern Cal district solely for school purposes.

III.
DECISION

For the foregoing reasons, the September 4, 2002 decision of the Board of Control of the Iowa High School Athletic Association that Hanno Jusek is ineligible to compete in interscholastic athletics for 90 consecutive school days at Southern Cal Community School District 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