

**IOWA STATE DEPARTMENT
OF EDUCATION
(Cite as 21 D.o.E. App. Dec. 186)**

<i>In re Malcolm S. Bevel</i>	:	
	:	
Henry & Daphne Bevel III, Appellants,	:	
	:	
v.	:	DECISION
Iowa High School Athletic Association, Appellee.	:	[Admin. Doc. #4517]

The above-captioned matter was heard telephonically on September 19, 2002, before Carol J. Greta, J.D., designated administrative law judge, presiding on behalf of Ted Stilwill, Director of the Iowa Department of Education.

Appellant, Henry Bevel III, an attorney licensed in the State of Iowa, was present and represented his wife, Daphne, and their the minor son, Malcolm Bevel. Appellee, Iowa High School Athletic Association [hereinafter, "IHSAA"] was present in the persons of Bernie Saggau, executive director, and Rick Wulkow, associate executive director. Appellee was represented by Attorney Bruce Anderson of Doran, Anderson & Baltimore of Boone, Iowa.

This hearing was held pursuant to Departmental administrative rules in 281 Iowa Administrative Code 6. The Iowa Department of Education has jurisdiction over the hearing pursuant to Iowa Code § 280.13 and 281 Iowa Administrative Code 36.17.

Appellants seek reversal of a decision of the IHSAA Board of Control made on September 4, 2002, declaring their son, Malcolm, ineligible to complete in interscholastic athletics for 90 school days following his transfer from Northern University High School ["NU High"] of the Malcolm Price Laboratory School to East High School of Waterloo Community School District ["East High"].

The undersigned administrative law judge finds that she and the Director of the Department of Education have jurisdiction over the parties and the subject matter of this appeal.

**I.
FINDINGS OF FACT**

Malcolm Bevel ["Malcolm"] is currently in the 11th grade at East High. He and his family have lived in the Waterloo school district at all times pertinent to this appeal. As a 7th grader, Malcolm attended Logan Middle School in the Waterloo district. Concerned about the quality of his education at Logan, the Bevels transferred Malcolm to the Laboratory School, where Malcolm completed grades 8, 9, and 10.

Mr. Bevel summarized Malcolm's experience at the Laboratory School, including NU High, by stating that on balance, it was a good place for Malcolm. Mr. Bevel stated that Malcolm attained a cumulative grade point average of 3.31 at the Laboratory School, while being challenged academically. Malcolm not only did well in his studies, he participated in athletics, speech competitions, the string orchestra (earning a position at the respected Dorian Festival at Luther College), a state history fair, and state and national Russian language competitions.

In February of 2002, officials at the University of Northern Iowa, the "parent" facility of the laboratory school, announced that grades 10 through 12 of NU High would "shift" to Cedar Falls and other area schools, beginning with the 2003-2004 school year. Mr. Bevel characterized this announcement in his testimony as NU High was "not going to offer grades 10 through 12," commencing with the 2003-2004 school year.

As the exact information that was made known to the public is important, the undersigned, using her authority to take official notice of all facts of which judicial notice may be taken pursuant to 281 IAC 6.12(2) "o"(5), quotes from three public documents, as follows:

Exhibit 1 is the news release from the University of Northern Iowa;

Exhibit 2, an excerpt of the February 20, 2002 minutes of the Iowa Board of Regents regular meeting; and

Exhibit 3, an excerpt of the May 15-16, 2002 minutes of the Iowa Board of Regents regular meeting.

The news release, Exhibit 1, states:

Malcolm Price Laboratory School (MPLS), a unit of the University of Northern Iowa College of Education, has announced that the UNI College of Education is in the process of forming a Professional Development School partnership with the Cedar Falls and Waterloo schools.

Part of the planning will include developing a Distributed Laboratory School concept. It will include an Early Childhood School; a campus-based N-9 [Nursery – grade 9] Laboratory School; and a Professional Development relationship with the Cedar Falls and Waterloo school districts.

"Under a Professional Development School model, UNI faculty and teachers from Cedar Falls and Waterloo would collaborate on how to best improve teaching and learning; curriculum development; and field experiences for UNI teacher education students. This also will give UNI teacher education students broader field experiences," said Thomas Switzer, Dean of the UNI College of Education.

With that in mind, planning will soon begin to shift the instruction of MPLS grades 10—12 to Cedar Falls, and other area schools, beginning with the 2003-2004 school year.

At the Board of Regents meeting on February 20, 2002, UNI President Robert Koob informed the Regents that the above information would be released on the following day to parents and the public. From the minutes of that meeting, Exhibit 2, is the following quote:

Regent Fisher asked if Price Laboratory School was closing. President Koob responded that it was not closing. The intent would be to move the high school element. Grades 10 through 12 require the largest extracurricular activities costs for programs such as sports, drama and music. Those programs would also be moved to the Cedar Falls school district. ...

At the high school level, University officials would like to experiment with broadening the lab school with what can be thought of as a distributed laboratory school model. ...

Id.

During the next several weeks, some parents of students at NU High made known their displeasure with the announcement. The Parent-Teacher Partnership of the school petitioned the Board of Regents for a Declaratory Order. Mr. Bevel stated that they were not party to the petition. At its May 2002 meeting, the Regents declined to respond to the petition, on the grounds that a Declaratory Order was premature. (Exhibit 3.) The reason for deciding that action on the petition would be premature was made clear later in the meeting when President Koob, a faculty member from NU High, and an NU High parent addressed the Regents:

... President Koob stated that, relative to discussion on this day, there is agreement to continue the Price Laboratory School grades 10-12 through the 2003 school years, and to prepare a plan for future years that will be made available to the Board [of Regents] by December 1 [2002]. The plan is to be submitted to his office by December 1 and then be presented to the Board whenever it is ready following his review.

...

Regent Becker said she had read there was an issue about timing of closing the school and the ability for families to open enroll students to other locations. Since the open enrollment papers need to be filed in January, she asked that the planning move forward before December 1. If the decision is to close the Laboratory School's grades 10 through 12, parents would have time to prepare open enrollment papers, if so desired. [The parent representative] stated that the PTP, the Price Laboratory

School administration and the University of Northern Iowa administration were fully aware of the January deadline for open enrollment. A November 1 deadline for the report has been considered. The deadline was established as December 1 just in case more time was needed. If the Board wishes that the matter be resolved by November 1 for presentation of a recommendation at the November Board of Regents meeting, she believed everyone would be willing to accommodate that deadline.

There was general agreement that the plan for future years will be provided to the Board of Regents in sufficient time for consideration at its November 2002 meeting.

Id.

It is clear from Exhibits 1 through 3 that the existence of grades 10 through 12 at NU High for the 2002-2003 school year was not in doubt, nor does Mr. Bevel argue that his family was fearful that the school would close immediately. His straightforward testimony was that, had Malcolm stayed at NU High for the 2002-2003 school year and were grades 10 through 12 not offered at the Laboratory School site, Malcolm would have to transfer as a senior to another attendance center. In light of the fact that Malcolm's post-secondary plans are to attend a college quite some distance from Waterloo, the Bevels made a family decision that he should not make what Mr. Bevel termed "a tough adjustment" two years in a row. Therefore, in April of 2002, Mr. Bevel registered Malcolm for the upcoming [present] school year at East High, that being the high school in which attendance center the family resides. Mr. Bevel was familiar with some of the academic offerings at East High from prior contact with the school, and, living but one mile from East High, the family was generally aware of the overall program offered at East.

Mr. Bevel clarified in his testimony that he and his family are not disputing the validity of the athletic eligibility transfer rules. Rather, the Bevels' issue is the application of the rules as to Malcolm and the factors that led to his transfer to East High. The family wants Malcolm to have, in Mr. Bevel's words, "the full high school experience." Hence, this appeal from the decision of the Board of Control that Malcolm is ineligible to compete in interscholastic athletics for his first 90 consecutive school days at East High.

On behalf of the IHSAA, Mr. Saggau did not dispute that the Bevel family's motivation in transferring Malcolm was based on academic reasons, not athletic reasons. The IHSAA did, however, state that Malcolm's transfer was from one member school to another member school, removing it from the language in 281-IAC 36.15(3) "a"(8) regarding "any transfer situation not provided for elsewhere in this chapter..." The implication is that the Board of Control did not consider the reasons for Malcolm's transfer in determining his eligibility.

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(2001). Those rules are found in 281 Iowa Administrative Code 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 Malcolm is ineligible to compete at East High 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 ... :

...

(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. ...

There is no question but that both NU High and the Waterloo school district are members of IHSAA.¹ Therefore, this is a member-school-to-member-school transfer, and is covered by the General Transfer Rule. The IHSAA argues that subparagraph (8) stands alone, that it must be interpreted apart from the words of paragraph 36.15(3) "a" that precede it. Its argument concludes that because this is a transfer from one member school to another member school, it is not a "transfer situation not provided for elsewhere in this chapter." Therefore, accordingly to the IHSAA, its executive board does not have to consider the factors behind Malcolm's transfer.

The language of subparagraph "a"(8) cannot be said to be so clear that reasonable minds cannot disagree about its intent. But the purpose of agency rulemaking is to give the public fair notice of the agency's regulations and how they will be applied. The plain language of rule 36.15(3) is that a student who transfers schools will be ineligible unless one of the exceptions in 36.15(3)"a" applies. There are 8 exceptions in paragraph "a". A member of the public could

¹ For purposes of this decision, no distinction need be made between member schools and associate member schools.

fairly conclude that, if exceptions (1) through (7) did not fit his child's situation, the final exception is intended as the "catch-all." Furthermore, the fourth exception includes students who are in an Iowa school pursuant to a foreign exchange program. These students have not transferred from one member school to another member school; they have simply transferred into a member school from another country. Therefore, the IHSAA's case cannot easily be made that exceptions (1) through (7) are exceptions for member school to member school transfers, while subparagraph "a"(8) is to be applied solely to transfers that do not involve such member-to-member transfers. This agency concludes that, in any transfer covered by the general transfer rule, where one of the first exceptions does not apply, the Board of Control must consider the motivating factors for the student transfer.

Accordingly, in this *de novo* review, this agency now considers the motivating factors put forth by Mr. Bevel.

Preliminarily, it is noted that 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). Given also that 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 vs. Drake University*, 837 F.Supp. 989(S.D. Iowa 1993)], the Bevels cannot successfully argue that Malcolm has been harmed by his ineligibility to compete. He is allowed by the rules to practice with the team and enjoy the camaraderie engendered by such association; he simply may not "suit up" and play with his teammates come game time. While such playing time is not regarded as a mere frivolity by this agency, Mr. Bevel testified that it was not a factor in the transfer. Accordingly, we shall not elevate its importance here.

This leaves the "fighting issue" whether a transfer motivated solely by the desire to avoid a transition from one educational setting to another for two consecutive years rises to the level that an exception should be made to the ineligibility rule for Malcolm. There are no cases in which this agency has previously stated that such motivation is sufficient to avoid the 90 consecutive schools days of ineligibility. We decline to do so in this case.

The evidence shows that a final determination of the fate of grades 10 through 12 of NU High was not made before Malcolm started school at East High, and, indeed, has not been made to date. The decision made by the Bevel family was made *in anticipation of* a decision not yet finalized by UNI or the Board of Regents. We have previously held, in a case involving a district in the discussion stages – but short of the decision stage – whether to whole-grade share with one or more other districts, that parents "should be able to wait to see what their school board does, and hear the Board's basis for its [decision], before having to make their decision." *In re Cameron Kroemer*, 9 D.o.E. App. Dec. 302 (1992).

We can draw more guidance from whole-grade sharing rules. [In whole-grade sharing, all or a substantial number of students in one or more grade levels are educated at another district other than the students' resident district.] Immediate eligibility to participate in interscholastic athletics is available for students who obtain open enrollment because their former district reorganized or dissolved or entered into a whole-grade sharing agreement. The latter reason is available only to students who are directly and immediately affected by the whole-grade sharing agreement. 281 IAC 36.15(4)(h). Therefore, in a district that whole-grade shares its 11th and 12th graders with another district, a student in 10th grade in that district cannot, *in anticipation of the next year*, leave the district (except by moving with the student's family into another district) and expect to have immediately eligibility in the 10th grade.

Another situation sometimes cited by parents for transferring a child is a closure of an attendance center within a district. Such a closure means that an affected student would be attending a different building with new teachers and new peers; in short, the student faces an educational transition. However, this instance is neither allowed by the open enrollment statute as good cause to file for open enrollment after the January 1 deadline, nor by the athletic eligibility rules as an exception to the 90 school days of ineligibility. Iowa Code section 282.18; 281 IAC 36.15.

In summary, there are recognized student transitions when the 90 consecutive school days of ineligibility do not apply. If grades 10 through 12 of NU High cease to be offered or are "shifted" to the Cedar Falls or other districts in 2003-2004, affected students will have immediate eligibility anywhere they attend school *at the start of that school year*. Because a transfer that is made in anticipation of a change is not recognized in the Iowa Code or Iowa Administrative Code as an exception to the general rule, we cannot read into the law what the lawmakers did not include themselves. A rule of statutory construction that cannot be disregarded is that, had the legislature intended to include immediate eligibility for students who transfer the year before anticipated changes to the student's present school, 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).

Certainly not all circumstances can be feasibly addressed by lawmakers. We have concluded that neither the IHSAA nor this agency is limited to granting immediate eligibility in cases that are directly addressed in law or rule. However, this agency declines to grant immediate eligibility to Malcolm because we conclude that a desire to avoid an educational transition two years in a row does not justify such a result.

III. DECISION

For the foregoing reasons, the September 4, 2002, decision of the Board of Control of the Iowa High School Athletic Association that Malcolm Bevel is ineligible to compete in

interscholastic athletics for 90 consecutive school days at East High is **AFFIRMED**. There are no costs associated with this appeal to be assessed to either party.

DATE

CAROL J. GRETA, J.D.
ADMINISTRATIVE LAW JUDGE

IT IS SO ORDERED.

DATE

TED STILWILL, DIRECTOR
DEPARTMENT OF EDUCATION