

**IOWA STATE DEPARTMENT  
OF EDUCATION  
(Cite as 21 D.o.E. App. Dec. 176)**

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*In re Webster N. Clayton IV,* :  
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 Webster & Scharron Clayton, Appellants, :  
 :  
 v. : DECISION  
 :  
 Iowa High School Athletic :  
 Association, , Appellee. : [Admin. Doc. #4514]

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

Appellant Scharron Clayton took part in the hearing on behalf of her minor son, Webster Clayton IV; Appellants were unrepresented by counsel. Executive Director Bernie Saggau of the Appellee, Iowa High School Athletic Association [herein referred to as “IHSAA”] participated in the hearing on behalf of IHSAA, which also chose to be unrepresented by counsel. Hearing was held pursuant to this agency’s administrative rules in 281 Iowa Administrative Code chapter 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 Webster 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 West High School of Waterloo Community School District [“West 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**

Webster Clayton IV [“Webster”] is presently a 10<sup>th</sup> grader at West High. He has lived with his family at all times pertinent to this appeal in the Waterloo Community School District. Prior to the 2002-2003 school year, Webster had been attending the Laboratory School. As a 9<sup>th</sup> grader at NU High, Webster participated in football on NU’s varsity squad; he also participated in basketball, track and field, and tennis, as well as the string orchestra of NU High.

Mrs. Clayton cites two primary reasons for Webster's transfer to West High from NU High: (1) concerns about Webster's study skills and proficiency in mathematics; and (2) uncertainty about the future of grades 10 through 12 at NU High following the 2002-2003 school year.

Regarding the family's first reason, Mrs. Clayton testified that the family contacted Sylvan Learning Center in Waterloo in spring 2001 because of their concerns for Webster's general study skills and specifically his mathematics proficiency. Mrs. Clayton stated at the appeal hearing that "little work" is done at the Laboratory School with respect to study skills. She also testified that she perceived a lack of articulation between the middle school mathematics curriculum at the laboratory school and its high school mathematics curriculum. Between Webster's 8<sup>th</sup> and 9<sup>th</sup> grade years, the Claytons enrolled him in their local Sylvan Learning Center's basic math and study skills programs, according to documents submitted by Mrs. Clayton. Mrs. Clayton testified that the family did not transfer Webster to West High prior to his 9<sup>th</sup> grade year because "too many things were missing in terms of skills."

Mrs. Clayton also presented many reasons for the transfer related to what she termed the changing school environment at NU High. 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. This, quite naturally, produced a great deal of consternation among parents of high school students at NU High.

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), will quote 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.

[Emphasis added.]

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. The first step in this direction, the implementation of an early childhood school in Waterloo with the cooperation of the Waterloo school district, was very successful. ...

*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. Mrs. Clayton stated that she was 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 Mrs. Clayton argue that her family was fearful that the school would close immediately. Rather, she argues

that the February 2002 announcement from UNI precipitated a drastic enough change in the present school environment that it simply was not the same school in which the family had enrolled Webster in the first place. To buttress this assertion, Mrs. Clayton testified that faculty and students had left and that services had changed. When asked, Mrs. Clayton admitted that she knew of no faculty members who had left whom Webster would have had as teachers this year. However, she did state that the elementary principal had left, leaving the secondary principal to act in that capacity also, to the best of her knowledge. She also stated that the activities director and a student advisor, the latter of whom Webster had apparently had much contact with, had chosen to leave the school prior to the start of the 2002-2003 school year.

When asked specifically what services she was referring to, Mrs. Clayton mentioned the string orchestra program. She stated that the instructor of this program was worried whether enough students would be left for the 2002-2003 school year to make the program viable. However, Mrs. Clayton did not know if, in addition to Webster, any participants in this program had actually left the school. She did testify that 19 students in grades 10 through 11 had left prior to the beginning of the 2002-2003 school year to attend the Cedar Falls district, the district in which NU High is located. Six of these students were in Webster's grade level. Including Webster, this would mean that his grade level was reduced by approximately 14%.<sup>1</sup>

Finally, Mrs. Clayton argues that the athletic eligibility transfer rules are punitive in nature because they punish students whose families transfer them from one school to another school for motivations other than athletics. She states that sports had nothing to do with her family's decision to have Webster leave NU High to attend West High, noting in addition to her other concerns that a transition to a new school as a sophomore would be easier on Webster than would a transition as a junior if NU High closes or is "shifted" to another district.

On behalf of IHSAA, Mr. Saggau did not dispute that the Clayton family's motivation in transferring Webster was based on academic reasons, not athletic reasons. He testified that the Board of Control gave full consideration to whether the reasons presented by the Claytons constituted sufficient extenuating circumstances to override the dictates of the General Transfer Rule. Mr. Saggau analogized Webster's transfer to an open enrollment transfer. Both transfers are available to parents for academic reasons, but, absent extenuating circumstances, the student who transfers is subject to the period of ineligibility before being able to compete in interscholastic athletics.

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<sup>1</sup> Iowa Code section 282.18(15) limits the total number of students who may be enrolled in the Laboratory School to 670 students. For purposes of this decision, an even distribution among grade levels is assumed.

## 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 Webster is ineligible to compete at West 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. ...

*Id.*

There is no question but that both NU High and the Waterloo school district are members of IHSAA. Therefore, this is a member-school-to-member-school transfer, and is covered by the general transfer rule. Because Webster and his family have always lived in the Waterloo district, he did not have to use open enrollment when he desired to leave NU High. He did, however, have to file an open enrollment application to enroll in the Laboratory School because he was not a resident of Cedar Falls. *See*, Iowa Code section 282.18(15)(2001). All of this is noted for the purpose of pointing out that an exception such as the one in 36.15(3)“a”(8) is not available for students who use open enrollment to transfer. There are nine exceptions (a – i) to the open enrollment transfer rule set forth in 28 IAC 36.15(4); none of them authorize the executive officer or executive board of IHSAA to consider motivating factor for the open enrollment. Thus,

if Webster had desired to leave NU High to attend Janesville Community School District, for example, his family would be estopped from even arguing about its motives for the transfer.

As it is, however, Webster did not need to use open enrollment. Therefore, his family has available to it the option of arguing that the motivating factors must be considered here. In this *de novo* review, the undersigned consider the motivating factors put forth by Mrs. Clayton.

The concerns of the family about Webster's study skills and proficiency in mathematics, while doubtlessly valid, are not persuasive. The press release [Exhibit 1] recognized that any proposed change was, in part, aimed at improving student learning and curriculum development, major concerns of the Claytons. In addition, as early as the Spring between his 8<sup>th</sup> and 9<sup>th</sup> grade years, the Claytons believed Webster needed academic assistance. The family could have transferred Webster to West High prior to his 9<sup>th</sup> grade year. Indeed, as West High is a 9-through-12 building, one could argue that his transition as a freshman into that building would have been easier than his transition as a sophomore.

When asked if the family would have had Webster transfer based on academic concerns alone, assuming that NU High would be in existence for years to come with no changes, Mrs. Clayton gave conflicting testimony. However, assuming for the sake of argument that Webster would have left NU High for West High based solely on the family's concerns about his studies, Webster would not be immediately eligible to participate in interscholastic athletics at any school to which he may have transferred. A family is certainly free to transfer its child, within the guidelines of applicable law, from school to school when it believes that a change will improve the child's academics. However, this motivating factor has never been approved by either this agency or the Board of Control of either athletic organization in Iowa as an extenuating circumstance that would produce immediate eligibility for the student to participate in interscholastic athletics.

As to the argument that the transfer rules are thus punitive, it must be noted that the transfer rules are reasonably related to IHSAA's purpose of deterring situations where transfers are not so 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 v. Drake University*, 837 F.Supp. 989 (S.D. Iowa 1993)], the Claytons cannot successfully argue that Webster 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, the Claytons have stated emphatically that it was not a factor in the transfer. Accordingly, we shall not elevate its importance here.

This leaves the argument that the school environment was so changed at NU High for the 2002-2003 school year that an exception should be made to the ineligibility rule for Webster.

School environments can change for various reasons – loss or surrender of accreditation, reorganization with one or more other districts, whole-grade sharing with one or more other districts, rejection of a reorganization plan, or rejection of a whole-grade sharing agreement. As these occurrences have been envisioned by the Iowa legislature, we are not without guidance. Iowa’s Open Enrollment Law, section 282.18(2001) of the Iowa Code, states that a parent or guardian may file for open enrollment of a child after the statutory January 1 deadline if one of the above circumstances has occurred, but only if the parent or guardian does so within a set window of time after the action is finalized. The statute does not allow for late-filed open enrollment applications made *in anticipation of* action. We have previously held 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).

Immediate eligibility is available for students who obtain open enrollment because their former district reorganized or dissolved or entered into a whole-grade sharing agreement. [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 student’s resident district.] 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 11<sup>th</sup> and 12<sup>th</sup> graders with another district, a student in 10<sup>th</sup> 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 10<sup>th</sup> 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, a changed school environment. 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 changes of a school environment 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 school year, 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. Neither the IHSAA nor this agency is limited to granting immediate eligibility in cases that are directly addressed in law or rule. Mr. Saggau testified that the Board of Control has regarded unforeseen family tragedies as extenuating circumstances that justify making an exception to the general ineligibility rule. Mr. Saggau also stated that the Board of Control gave consideration to the reasons cited by the Clayton family for Webster’s transfer; he did not state why the Board did not regard the Claytons’ factors as compelling enough to grant immediate eligibility. However, as this is a *de novo* hearing, the Board of Control’s decision is not reviewed here for reasonableness or by any other standard.

This agency declines to grant immediate eligibility to Webster because we conclude that the reasons presented by the Claytons do not compel 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 Webster Clayton IV is ineligible to compete in interscholastic athletics for 90 consecutive school days at West High is **AFFIRMED**. There are no costs associated with this appeal to be assigned to either party.

\_\_\_\_\_  
Date

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

It is so ordered.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Ted Stilwill, Director  
Department of Education