

IOWA DEPARTMENT OF EDUCATION

(Cite as 28 DoE App. Dec. 299)*In re: Athletic Eligibility*

JOSE PABLO S. Q.,

Appellant,

Case No. 19DOE0004
DE Admin.Doc. No. 5093

v.

IOWA DEPARTMENT OF
EDUCATION,

Appellee.

DECISION

This matter was heard in person at the Wallace State Office Building on October 9, 2018, by 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).

The Appellant, Jose Pablo S. Q., was personally present and represented by attorney Patrick Chambers. Attorney Brian Humke represented the Appellee, Iowa High School Athletic Association (IHSAA). Also appearing for IHSAA were Executive Director Alan Beste and Assistant Director Jared Chizek.

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 of Education have jurisdiction over the parties and subject matter of this appeal.

Jose Pablo seeks reversal of a decision that the IHSAA Board of Control (Board) made on September 6, 2018, finding that he is ineligible to participate in varsity athletics at Xavier High School for 90 days pursuant to the general transfer rule. At hearing, Jose Pablo, his mother, Ms. Ana Paula Q. P., and Mr. Ryan Chambers presented testimony on behalf of Jose Pablo. Jared Chizek testified on behalf of IHSAA. The IHSAA offered the following items into evidence:

- Documents that had been made available to the members of the Board of Control for the hearing on August 30, 2018;

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- Decision of the Board of Control
- Minutes of the meeting of the Board on August 30, 2018;
- A recording of the hearing before the Board of Control; and
- A DVD containing a YouTube highlight video of the Appellant

Jose Pablo submitted affidavits that were part of his notice of appeal to the Board of Education filed September 21, 2018. All proffered documents and the recording were admitted into the record. Both parties made closing arguments and filed timely post-hearing briefs.

FINDINGS OF FACT

The Appellant, Jose Pablo, is a citizen of Mexico. He attended Xavier High School in Cedar Rapids, Iowa, his freshman year of high school during the 2015-2016 school year. He had an F-1 visa during that stay. During his freshman year, Jose Pablo participated in football, wrestling, and soccer at Xavier. Jose Pablo returned to Mexico for his sophomore and junior years of high school. In the spring of 2018, he reached out to his host family in Cedar Rapids, Ryan Chambers, and expressed a desire to return to Xavier High Schools for his senior year. Jose Pablo's school in Mexico, Estudios Superiores de Monterrey (ITESM), required at least one semester of international study. Jose Pablo chose to fulfill this requirement by returning to Xavier High School. He reentered the United States on an F-1 visa in July 2018 and is currently enrolled at Xavier. Jose Pablo requested immediate eligibility at the varsity level from the Iowa High School Athletic Association (IHSAA) under the foreign exchange student and catchall exceptions to the general transfer rule. Xavier High School is a member of the IHSAA. (Exh. A)

Jared Chizek, IHSAA assistant director, determined that Jose Pablo was not eligible to participate at the varsity level for 90 school days. Jose Pablo appealed this decision. On August 30, 2018, the Board of Control conducted a hearing to reconsider eligibility. On September 6, 2018, the Board denied Jose Pablo's request for immediate eligibility. Jose Pablo appealed. (Exhs. A, B)

At this hearing on appeal, Jose Pablo and his mother, Ms. Ana Paula Q. P., explained the family was unaware Appellant would be ineligible to compete in varsity athletics for 90 days under the transfer rule when making the decision to return to Xavier. They first learned that there was an issue with eligibility on the day they were scheduled to travel to Iowa. Ms. Ana Paula Q. P. completed all the necessary paperwork for her son to facilitate his travel to the United States. She worked directly with Xavier High School staff in this process. She was unaware that only foreign students participating in an exchange visitor program can obtain a J-1 visa and meet the requirements for the foreign exchange exception to the transfer rule. Jose Pablo is not participating in an exchange visitor program and has an F-1 visa. The family has been informed by the Department of Homeland Security that Jose Pablo is not eligible for a J-1 visa because he entered the United States with an F-1 visa during the 2015-2016 school year. Ms. Ana Paula Q. P. acknowledged that without an F-1 visa her son would not be eligible to receive a diploma

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from Xavier High School which is his top priority. (Jose Pablo S. Q. testimony; Ana Paula Q. P. testimony)

CONCLUSIONS OF LAW, ANALYSIS

Standard of Review

This appeal is brought pursuant to 281 Iowa Administrative Code 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 Iowa Administrative Code (IAC) 6.17(2). The Director of the Department of Education examines the IHSAA Board of Control’s application of the transfer rule to Jose Pablo 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.* 659 N.W.2d at 566 (holding that the Iowa Department of Education erred when it did not apply the abuse of discretion standard).

Does Jose Pablo Qualify for Immediate Participation in Varsity Athletics Under Any of the Exceptions to the General Transfer Rule?

Jose Pablo asserts that the Board of Control’s decision was unreasonable and should be reversed because of the following arguments: 1) Jose Pablo should be treated as a participant of a foreign exchange program; and 2) Jose Pablo should be granted an exception to the transfer rule under section 281 IAC 35.15(3)“a”(9), also referred to as the “catchall” exception.

The Iowa Legislature, in Iowa Code § 256.46, directed the State Board of Education to adopt rules to address eligibility of transfer students. The State Board of Education then promulgated and adopted the general transfer rule, 281—IAC 36.15(3).

36.15(3) General transfer rule. A student who transfers from a school in another state or country or 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, as defined in rule 281—12.1(256), exclusive of summer enrollment, unless one of the exceptions listed in paragraph 36.15(3) “a” applies. The period of ineligibility applies only to varsity

level contests and competitions. ("Varsity" means the highest level of competition offered by one school or school district against the highest level of competition offered by an opposing school or school district.) In ruling upon the eligibility of transfer students, the executive board shall consider the factors motivating student changes in residency. Unless otherwise provided in these rules, a student intending to establish residency must show that the student is physically present in the district for the purpose of making a home and not solely for school or athletic purposes.

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 and may make eligibility contingent upon proof that the student has been in attendance in the new school for at least ten school days:

(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. In addition, if with a contemporaneous change in parental residence, the student had attended an accredited nonpublic member or associate member school immediately prior to the change in parental residence, the student may have immediate eligibility if the student transfers to another accredited nonpublic member or associate member school.

(2) If the student is attending in a school district as a result of a whole-grade sharing agreement between the student's resident district and the new school district of attendance, the student is immediately eligible.

(3) A student who has attended high school in a district other than where the student's parent(s) resides, and who subsequently returns to live with the student's parent(s), becomes immediately eligible in the parent's resident district.

(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, as evidenced by a J-1 visa issued by the United States government, unless the student attends the school primarily for athletic purposes.
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.

(5) A transfer student who attends in a member or associate member school that is a party to a cooperative student participation agreement, as defined in rule 281—36.20(280), with the member or associate member school the student previously attended is immediately eligible in the new district to compete in those interscholastic athletic activities covered by the cooperative agreement.

(6) Any student whose parents change district of residence but who remains in the original district without interruption in attendance continues to be eligible in the member or associate member school of attendance.

(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) A student who is found by the attending district to be a homeless child or youth as defined in rule 281—33.2(256).

(9) 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.

b. In ruling upon the transfer of students who have been emancipated by marriage or have reached the age of majority, the executive board shall consider all circumstances with regard to the transfer to determine if it is principally for school or athletic purposes, in which case participation shall not be approved.

c. A student who participates in the name of a member or associate member school during the summer following eighth grade is ineligible to participate in the name of another member or associate member school in the first 90 consecutive school days of ninth grade unless a change of residence has occurred after the student began participating in the summer.

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d. A school district that has more than one high school in its district shall set its own eligibility policies regarding intradistrict transfers.

Iowa Admin. Code r. 281-36.15(3).

Applicability of Subparagraph 36.15(3)“a”(4)3

The exception at 36.15(3) “a”(4)3 specifically allows an exception to a participant in a foreign exchange program as evidenced by a J-1 visa issued by the United States government.

The Department of Education has dealt with cases involving foreign students in the past.

Pursuant to federal law (states do not issue visas; therefore they may not define the types of visas), J-1 visas are limited to foreign students who participate in approved exchange programs. 8 U.S.C. section 101(13); 22 C.F.R. sections 62.1, 62.25. On the other hand, foreign students on F-1 visas are in the United States legally, but are not *exchange* students. 22 C.F.R. section 62.1(b). The policy decision of the Iowa Legislature is to grant immediate eligibility only to those with the J-1 visa.

In re Johannes Klein, 23 D.o.E. Dec. 329, 334 (2005)

There is no dispute that Jose Pablo does not have a J-1 visa. He is purportedly ineligible for a J-1 visa because of his prior enrollment with an F-1 visa at Xavier during the 2015-2016 school year. He also is not participating in any sanctioned exchange visitor program. Jose Pablo clearly does not qualify for an exception to the transfer rule under this provision. Further, the record indicates Jose Pablo would not have chosen to obtain a J-1 visa even if it was an available option. The record contains testimony indicating he would be ineligible to obtain a diploma from Xavier without an F-1 visa. Jose Pablo and his mother testified that a diploma from Xavier is his priority.

Applicability of Subparagraph 36.15(3)“a”(9)

281—IAC 36.15(3)“a”(9) is also known as the “catchall” or exceptional circumstances subrule. The Board properly concluded that no exception should be made for Jose Pablo under this subrule. The Department has previously stated that it reserves this final exception “for compelling personal circumstances, such as when a student is in danger of immediate and identifiable irreparable harm.” *In re Austin Trumbull*, 26 D.o.E. App. Dec. 99, 102 (2011), citing *In re Derek Sears*, 25 D.o.E. App. Dec. 15 (2007).

“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

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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 analysis comes down to whether the Board abused its discretion in deciding that an exception should not be granted to Jose Pablo. The undersigned concludes that the Board did not abuse its discretion when it refused to grant an exception to Jose Pablo under 281— IAC 36.15(3)“a”(9).

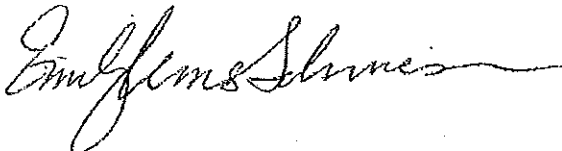
The Board properly reviewed Jose Pablo’s motivating factors for transfer as well as existing guidance from the Department of Education. There is no indication that Jose Pablo’s decision to enroll at Xavier was primarily because of his desire to play varsity football. He chose to come to Iowa and enroll at Xavier for his senior year to attend school and participate in activities. If successful, this choice will enable him to obtain diplomas from both his high school in Mexico and from Xavier. Jose Pablo made this choice, over other possible destinations, based largely on his very positive experience at Xavier during the 2015-2016 school year. There is no evidence that his transfer was in any way the result of a situation that could potentially place him in danger of immediate and identifiable irreparable harm.

There are no exceptions to the transfer rules that apply to Jose Pablo’s situation. 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 has applied the rules unreasonably. Here, the Board did not erroneously or unreasonably apply the general transfer rule to determine that Jose Pablo is ineligible to participate in varsity interscholastic athletics for a period of 90 days. There was no abuse of discretion; the decision is affirmed.

DECISION

For the foregoing reasons, the decision of the Board of Control of the Iowa High School Athletic Association, which found Jose Pablo S. Q. ineligible to participate in varsity athletics at Xavier High School for 90 school days pursuant to the general transfer rule, is AFFIRMED. There are no costs associated with this appeal to be assigned to either party.

Dated this 19th day of October, 2018.

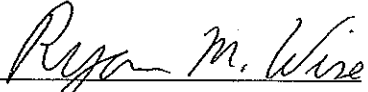


Emily Kimes-Schwiesow
Administrative Law Judge

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It is so ordered.

10-22-18
Date



Ryan M. Wise, Director
Iowa Department of Education