IOWA DEPARTMENT OF EDUCATION

(Cite as 29 D.o.E. App. Dec. 038)

In re: Athletic Eligibility	)	
	)	
[redacted]	)	Case No. 19DOE0002
Appellant,	)	DE Admin. Doc. No. 5086
	)	
v.	)	
	)	
Iowa High School Athletic Association,	)	**DECISION**
Appellee.	)	
	)	

STATEMENT OF THE CASE

This matter was heard via telephone hearing on July 19, 2018, by Joseph Ferrentino, designated administrative law judge with the Iowa Department of Inspections and Appeals, presiding on behalf of Ryan M. Wise, Director of the Iowa Department of Education (Department).

The appellant, [redacted] ([redacted]), was present. His mother and father, [redacted] and [redacted], were present, as was his aunt, [redacted]. The Iowa High School Athletic Association (IHSAA) was represented by attorney Brian Humke. Also appearing for the IHSAA was executive director Alan Beste.

An evidentiary hearing was held pursuant to departmental rules found at Iowa Administrative Code agency 281, chapter 6. Jurisdiction for this appeal is pursuant to Iowa Code section 280.13 and Iowa Administrative Code rule 281-36.17. The undersigned finds he 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 IHSAA Board of Control (Board) made on June 18, 2018, finding that [redacted], a rising senior at [redacted] Community High School, is ineligible to compete in varsity interscholastic athletics for ninety consecutive school days, under the provisions of the general transfer rule. *See* Iowa Admin. Code r. 281-36.15(3).

At the hearing, [redacted] and [redacted] testified on behalf of the appellant. [redacted] did not testify. Alan Beste testified for the IHSAA. The following items were offered into evidence and admitted without objection:

- A recording of the hearing before the Board;

- Documents that had been made available to the Board, including several letters written in support of [redacted];
- Minutes of the meeting of the Board on June 11, 2018; and
- A copy of the decision of the Board signed by Chairperson Greg Darling.

The appellants also offered into evidence a letter of support for the appellant written by [redacted] Community School District ([redacted]) Superintendent [redacted], dated June 28. This was admitted over the appellee's objection. *See id.* r. 281-6.12(2)(d) (allowing submission of evidence by appellant where parties do not agree to a stipulated record).

The IHSAA requested time to submit a post-hearing brief. *See id.* r. 281-6.12(2)(n). The record was kept open for seven days to allow both parties to submit briefs. Both parties submitted briefs. The appellant's brief included, as attachments, a copy of another student's Board of Control decision and an informational booklet about the McKinney-Vento Homeless Assistance Act. *See* 42 U.S.C. § 11301 *et seq*. The IHSAA objected to the Board decision, which it called "a confidential record of a student in another district,"[1] and asked for additional time to submit a reply brief on the issue. Both parties were given until ten days post-hearing, *see* Iowa Admin. Code r. 281-6.12(2)(n), to submit any reply brief they felt was necessary on the issue of student confidentiality. *See* Iowa Code § 17A.3(1)(e) (requiring an agency to "[m]ake available for public inspection . . . all final orders, decisions, and opinions"); Iowa Admin. Code r. 281-5.13(2)(e) (authorizing redaction of "identifying details" in final orders, decision, and opinions); *see also* Iowa Admin. Code r. 281-6.17 (providing a proposed decision becomes a "final decision" absent an appeal or subsequent amendment by the state board). Both parties submitted additional briefing. The record was then closed.

FINDINGS OF FACT

[redacted] is a student entering his senior year of high school. [redacted] has been enrolled at [redacted] since February 2018. He turned eighteen in April 2018. Prior to his enrollment at [redacted], he spent several months at a residential treatment facility in Utah, where he also attended school. Before that, he was a student at [redacted] High School in [redacted], Illinois, a suburb of Chicago where his parents live.

When [redacted] lived in [redacted], he became involved in gang activity. He has both physical and emotional scars from this involvement. He was stabbed and shot at while in Illinois. After stealing a car, he was ordered to choose between jail and residential treatment. He chose the residential treatment facility.

As [redacted] time at the residential treatment facility drew to a close, he was faced with a decision about where to live: Illinois or Iowa. The bulk of the evidence before the Board supported a conclusion that [redacted] decision was truly a voluntary one, but that the recommendations of his treating professionals were for him to move to Iowa and live with

[1] The Department routinely makes available IHSAA cases that proceed to Department review at https://www.edinfo.state.ia.us/web/appeals_float.asp. Cases resolved at the Board level are not listed on the website.

his aunt and uncle to escape the dangerous path he risked continuing down should he return to Illinois. At the hearing before the undersigned, the appellant's witnesses testified, in stronger language than that used before the Board, that [redacted] was not allowed back in his parents' home in Illinois after his time at the Utah treatment facility. On top of the other concerns involving gangs and criminal activities, it was revealed [redacted] had stolen from his parents and assaulted them. And in the appellant's post-hearing brief, the decision was painted as one of literal life and death, as returning to Chicago "would certainly mean his demise."

[redacted] chose to live with his aunt and uncle and enroll at [redacted]. He enrolled at a trimester break in February to maximize the ease of his transition. He did not play any varsity sports during the spring season. [redacted] wishes to participate in varsity baseball, football, wrestling, and golf. The undisputed evidence is that he is an average athlete who is not carpet bagging in hopes of securing superior coaching or a college scholarship and that his choice of [redacted] was more about attending school there than playing sports there. [redacted] wants to play varsity sports because he likes playing sports and the friends he's made since enrolling play on the varsity teams at [redacted].

The IHSAA requires students who transfer into a new school district to serve a ninety-school-day suspension before participating in varsity interscholastic athletic activities. Student-athletes may play junior varsity games and may practice with varsity teams but may not play in varsity games during this suspension period. [redacted] has served approximately sixty days of his suspension. He played junior varsity baseball this summer and attended all his school's varsity baseball games because he had friends on the team and wanted to be involved with the team. His suspension, if upheld, will expire after six varsity football games in the upcoming fall season, leaving [redacted] with the ability to play three varsity football games before fully participating in whichever varsity sports he may select following the conclusion of football season.

The IHSAA initially determined [redacted] was ineligible to participate in varsity sports on or about May 23. [redacted] appealed that decision to the Board.

Prior to the hearing before the Board, Beste emailed [redacted]. The May 30 email included this statement: "Finally, below is a copy of the General Transfer Rule, as per the Iowa Administrative Code. To help prepare the Board, please let me know what exception(s) you believe apply to [redacted] situation." Beste's email then contained the text of Iowa Administrative Code rule 281-36.15(3), as the rule existed prior to January 10, 2018. In that format, the rule provided for eight exceptions to the general rule mandating a ninety-day suspension. *See* Iowa Admin. Code r. 281-36.15(3) (2017). At the time of Beste's email, however, the rule had been amended to add a ninth exception, commonly referred to as the "homeless" exception. *See* XL Iowa Admin. Bull. 1334–35 (Dec. 6, 2017). Although [redacted] response to Beste's email did not name an exception, [redacted] at the June 11 Board hearing did specify that "number eight"—the catch-all provision (now "number nine")—was the exception at issue.

The Board issued its ruling on June 18. The ruling states:

C. CONCLUSIONS:

The General Transfer Rule states in pertinent part:

> 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 . . . , 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. . . . . 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.

This Appeal is based on Rule 36.15(3)a(8), which states:

> 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 IHSAA staff is not empowered to make a determination that the requested exception be granted or denied. The granting of eligibility under this exception is solely within the province of the Board of Control.

D. DECISION:

The Board considers the matter fully and has considered the information presented. In reviewing the evidence submitted as well as the testimony at the hearing, the Board determines that an exception should not be granted. The evidence presented does not justify granting an exception to the general transfer rule.

In reaching its decision, the Board considers the evidence presented relating to the reason for the transfer. [redacted] move to Iowa was voluntary based upon the family's belief that it was in his best interest. [redacted] transfer to [redacted] was as a result of a choice made by [redacted] and his parents. Families have the right to make choices about where students reside

and attend school. However, the General Transfer Rule is still applicable to those situations.

In the matter before the Board, documentation was submitted indicating that [redacted] requested to live with his aunt and uncle for the purpose of attending school where he could play sports and finish his school year. (May 24, 2018 Letter to Board from [redacted]). The importance of [redacted] participation in sports was referenced several times by the Appellant in the documentation submitted to the Board as well as the hearing testimony. During the period of ineligibility, [redacted] is able to practice with the team and be a part of team activities. He may participate below the varsity level in interscholastic contests.

The motivation to transfer and enroll in another school need not be related solely to athletics for the Board to deny eligibility. The Board of Control and Department of Education [have] consistently declined to make an exception to the 90-school-day period of ineligibility in cases even where the motivating factor for the transfer was something other than sports. *In re Brandon James Bergman*, 22 D.o.E. App. Dec. 130, 134 (2003).

By all descriptions, [redacted] and his parents have a good relationship. This is not a case where the student could not return to his home because of family discord. Testimony at the hearing indicated that there had been no change in the parents' marital or family status. In the appeal letter from Superintendent [redacted], he states that [redacted] has "great parents" and that they had reached out to family as the parents "could not afford to pick up and move leaving their current jobs."

The Board believes that its decision is fair and reasonable. There exists no compelling reason or basis to grant an exception to the General Transfer Rule. The Board further finds that a grant of eligibility in this case would be a violation of the spirit of the General Transfer Rule.

[redacted] appeals that decision.

CONCLUSIONS OF LAW

This appeal is brought pursuant to Iowa Administrative Code rule 281-36.17, which provides that if a claimant is "still dissatisfied" following a Board hearing, the claimant may make a written appeal to the director of education. *See* Iowa Admin. Code r. 281-36.17. The procedures for such a hearing are set forth in Iowa Administrative Code agency 281, chapter 6; that is, they are the general rules for Department appeals, "except that the decision of the director is final." *Id.* "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." *Id.* r. 281-6.17(2).

Standard of Review

The standard of review in these cases is de novo. *See id.* r. 281-6.12(2) (providing for submission of evidence at appeal hearing); 281-6.12(o)(1) ("Because the administrative law judge must decide each case correctly as to the parties . . . [and] must also decide what is in the public's best interest, it is necessary to allow for the reception of all relevant evidence which will contribute to an informed result."); *In re Austin Trumbull*, 26 D.o.E. App. Dec. 99, 100 (2011) (considering facts not raised before Board); *In re Chase S.*, 22 D.o.E. App. Dec. 136, 137 (2003) (same); *In re Douglas Gillett*, 21 D.o.E. App. Dec. 218, 221 (2002); *In re Malcolm S. Bevel*, 21 D.o.E. App. Dec. 186, 191 (2002); *In re Webster N. Clayton IV*, 21 D.o.E. App. Dec. 176, 182 (2002); *In re Nancy Sue Walsh*, 3 D.P.I. App. Dec. 34, 39 (1982) ("Only after an open and complete revelation of the facts, as [this tribunal] had before it, could a fair and equitable decision be rendered in this matter."); *In re Scott Anderson*, 1 D.P.I. App. Dec. 280, 282 (1978); *cf. In re Evan P.*, 27 D.o.E. App. Dec. 634, at *2, *5 (2015) (stating standard is "abuse of discretion" but considering testimony); *In re Thor L.*, 27 D.o.E. App. Dec. 530, 530, 533 (2014) (same); *In re Derek Sears*, 25 D.o.E. App. Dec. 15, at *3 (2007) (noting "abuse of discretion" standard is proper only at judicial review stage).

The IHSAA asserts otherwise. It argues review is for abuse of discretion.

The "abuse of discretion" standard, in the administrative context, typically applies to judicial review of agency action. *See* Iowa Code § 17A.19(10)(n); *Ind. High School Athletic Ass'n, Inc. v. Carlberg by Carlberg*, 694 N.E.2d 222, 230 (Ind. 1997). This proceeding remains agency action. *See* Iowa Code §§ 17A.2(2) (defining "agency action"); 17A.19(1) (providing judicial review is available upon exhaustion of "all adequate administrative remedies"). No statute directs the agency to review for abuse of discretion in this instance. The standard, therefore, has no statutory claim on this proceeding.

Nor does it have a logical claim. "Abuse of discretion" is a deferential standard that acknowledges instances in which the legislature has vested an agency with the power to interpret its own rules and apply its "own special expertness." *Renda v. Iowa Civ. Rights Comm'n*, 784 N.W.2d 8, 11 (Iowa 2010). Because this matter is still "agency action," undoubtedly the agency is as free now as it was earlier to exercise its "own special expertness" with regard to this case. Moreover, the rationale for such a deferential review by the courts would surely evaporate if agencies began sacrificing their expertness in favor of deference all the way down. *Cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (noting deference applies in federal context where "agency focuses fully and directly upon the issue"); *Palmer Coll. of Chiropractic v. Davenport Civ. Rights Comm'n*, 850 N.W.2d 326, 338–42 (Iowa 2014) (declining to grant deference to school's investigation of civil rights complaint where school "failed to establish it met the legal prerequisites for deference").

In certain instances, the general claims above must yield to specific grants of power. For example, the Department reviews decisions by school districts in the provision of transportation for abuse of discretion. *Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Ed.*, 659 N.W.2d 563, 568 (Iowa 2003). This is because "[t]he powers and duties of public office are

measured by the terms and necessary implication of the grant of constitutional or statutory authority" and relevant statutory authority vests school districts with discretion as to the provision of transportation. See id. at 568–69 (citing Iowa Code § 285.12).

Sioux City has indeed been cited to establish the standard of review in athletics eligibility cases. *See, e.g.*, *Thor L.*, 27 D.o.E. App. Dec. at 533. The case therefore merits some discussion. In *Sioux City*, the school district's board of directors had broad discretion, pursuant to statute, to provide transportation for district students. *See Sioux City Cmty. Sch. Dist.*, 659 N.W.2d at 566–67 (citing Iowa Code § 285.1(1)). The statute empowering Department review did not "suggest[] the scope of the Department's review of the school district's decision is de novo." *Id.* at 568. "Rather, where a statute provides for a review of a school district's discretionary action, the review, by necessary implication, is limited to determining whether the school district abused its discretion." *Id.*

Sioux City is distinguishable because of who it governs. Unlike a school board, the IHSAA is not a "public office." The IHSAA is one of several "organizations" registered with the Department. *See* Iowa Admin. Code r. 281-36.2. These are explicitly defined to exclude "an agency of this state [or] a public or private school or school board." Iowa Code § 280.13 (defining "organization" for purposes of interscholastic athletic contests and competitions). And the IHSAA executive board, unlike school boards, is not composed of publicly elected members—one member is appointed by the Iowa association of school boards, one is elected by ballot of member schools, and others may be elected "as provided by the organization's constitution." Iowa Admin. Code r. 281-36.4; *cf.* Iowa Code § 277.1 (providing for regular election of school district officers).

Sioux City is also distinguishable because of what it governs. *Sioux City* holds where a statute gives a school district discretion and no statute suggests the scope of the Department's review, the Department's review is limited to whether the district abused its discretion. There is no statutory authority, however, granting the IHSAA any powers. Instead, there are two statutes arguably at play. One orders the state board to adopt rules on eligibility. *See* Iowa Code § 256.46. The other requires the IHSAA to be "in compliance with rules which the state board of education adopts for the proper . . . adoption of eligibility requirements." Iowa Code § 280.13. Here, therefore, it is the state board that makes the eligibility rules, and the IHSAA that must be in compliance therewith. The IHSAA does not have any statutory discretion on how to interpret or administer those rules. *See Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555, 562–63 (Iowa 1972). Again, the IHSAA has no statutory powers whatsoever. *Sioux City* has nothing to say about a situation in which the entity empowered to ensure compliance with a statute adjudicates said compliance. That is, the state board adopting rules and ensuring compliance therewith is different from the Department second-guessing discretion statutorily granted to a school district. While the school district is in the driver's seat with respect to providing transportation, the state board of education is the referee on athletics eligibility. *See id.*

The statutes dictate critical analysis of the IHSAA, not deference. To be sure, the IHSAA must be in compliance with state rules to exist meaningfully. *See* Iowa Code § 280.13. But the IHSAA is a separate entity whose interests may not always align with the mission of the

Department. The IHSAA "has as one of its primary purposes the sponsoring or administration of extracurricular interscholastic athletic contests or competitions." *Id.* The Department has a significantly broader charge. *See* Iowa Code § 256.1 (establishing Department's responsibilities). This interest disparity may result in decisions that are not "based on . . . the regulations and policies of the department of education and . . . in the best interest of education." Iowa Admin. Code r. 281-6.17(2). Outsize deference to the IHSAA risks ceding the Department's goals to those of the IHSAA, at least as concerns adjudicatory cases on athletics eligibility.

Agency rule mandates use of de novo review. Logic and precedent suggest it. No statute, rule, or precedent compels use of the abuse of discretion standard. De novo review is proper.

Discussion

The general transfer rule, as it has existed at all times pertinent to this case, provides:

> **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.
>
> *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).

The application of this rule begins with determining whether a student is a transfer student. *Id.* If so, the student is ineligible to participate in varsity sports for ninety consecutive school days unless an exception applies. *Id.* The executive board "shall consider the factors motivating student changes in residency." *Id.* "[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." *Id.*

There are nine exceptions to this general rule, all of which "[t]he executive officer or executive board shall consider and apply." *Id.* r. 281-36.15(3)(a). Even if, upon finding a transfer student fits within an exception, the board determines the student is eligible, the board may still "make eligibility contingent upon proof that the student has been in attendance in the new school for at least ten school days." *Id.* The nine exceptions relate to the following situations: (1) a student moves with his or her parent(s); (2) a student attends school as part of a whole-grade sharing agreement; (3) a student "returns" to live with his or her parent(s); (4) a student's residence changes "due to" one of a specific list of challenges; (5) a student's school is party to a cooperative student participation agreement; (6) a student remains in a district despite a parental move; (7) a special education student's attendance center changes with agreement from the student's district of residence; (8) a student's district finds he or she is homeless; or (9) "[i]n 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." *Id.*

In cases where the student has 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." *Id.* r. 281-36.15(3)(b). If the transfer is principally for school or athletic purposes, "participation shall not be approved." *Id.*

In cases where the student is a rising freshman or the school district contains multiple high schools, other considerations apply. *See id.* r. 281-36.15(3)(c), (d). Those considerations are not at play here.

Here, [redacted] transferred from a school in another state (Utah). He is, therefore, a transfer student. [redacted] has been in attendance at [redacted] for at least ten school days. The factors motivating his move to Iowa include a desire to leave the residential treatment facility; a recognition of the poor choices he made while living in Illinois; a fear of repeating those choices or otherwise relapsing; familiarity with his extended family in Iowa; and surely some desire to attend school and play sports in a safe environment. This is a sufficient showing that [redacted] is in Iowa to make a home and not solely, or principally, for school or sports. *See id.* r. 281-36.15(3), (3)(b).

[redacted] did not move with his parents. He does not attend school as part of a whole-grade sharing agreement. He has not returned to [redacted] with his parents. Nothing in the record indicates his school is party to a cooperative student participation agreement. He did not remain in [redacted] despite a parental move elsewhere. He is not a special education student. These six exceptions may all easily be rejected. *See id.* r. 281-36.15(3)(a)(1), (2), (3), (5), (6), (7).

Three exceptions require further discussion. The first is the exception related to a change in residence due to participation in a rehabilitative program or change in legal status. *See id.* r. 281-36.15(3)(a)(4). [redacted] residence changed due to participation in a mental health program. *See id.* r. 281-36.15(3)(a)(4)(6). His situation is directly analogous to that in *Evan P.* In *Evan P.*, a student exhibited behaviors that led his parents to suspect he was abusing substances. *Evan P.*, 27 D.O.E. App Dec. 634, at *3. His parents enrolled him in a "residential nonpublic therapeutic school" in Missouri, where he stayed for ten months. *Id.* At the start of the next school year, he re-enrolled at the school he had attended prior to attending school in Missouri, Dowling Catholic High School in West Des Moines. *Id.* He requested immediate eligibility for varsity football. *Id.* Ultimately, the Department concluded the student was immediately eligible under this exception to the general transfer rule because the Missouri school offered therapeutic services and the student's return home was in keeping with the exception's goal of promoting a "fresh start." *Id.* at 8. This is precisely the case with [redacted]. As a result, he should be immediately eligible for varsity sports, provided he meets "all other eligibility requirements in these rules and those set by the school of attendance." Iowa Admin. Code r. 281-36.15(3)(a)(4).

While that conclusion settles the matter, the regulation requires consideration and application of all exceptions. *Id.* r. 281-36.15(3)(a); *see also* Iowa Code § 4.1(30)(a) ("The word 'shall' imposes a duty."). Consider the "homeless" exception. [redacted] is arguably a homeless student. *See* Iowa Admin. Code r. 281-36.15(3)(a)(8). A homeless child is a child "who lacks a fixed, regular, and adequate nighttime residence" and includes a child "who is sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason." *Id.* r. 281-33.2. Nothing in the record shows his school district has determined he is homeless, which precludes relief from this exception. *See id.* r. 281-36.15(3)(a)(8) (requiring finding by school district). At least one court, however, has found a child in a situation not too dissimilar from [redacted] to be homeless. *See L.R. ex rel. G.R. v. Steelton-Highspire Sch. Dist.*, No. 1:10-cv-00468, 2010 WL 1433146, at *5 (M.D. Pa. Apr. 7, 2010) (determining child was homeless where child's home burned down and child then stayed with relatives for lengthy period of time despite child's mother living down the street). If pressed, though, the undersigned would conclude [redacted] is not homeless, because he has a "fixed, regular, and adequate nighttime residence." *Cf. Derek Sears*, 25 D.o.E. App. Dec. 15, at *2 (considering student who bounced around among different relatives within same school district). Still, the Board was incorrect to (a) fail to consider and apply this exception; and (b) provide the appellant with a version of the regulation that omitted this exception. If nothing else, providing the superintendent, [redacted], with the correct regulation would have put the school district on notice to consider whether [redacted] is homeless. *See id.* at *5 (noting district considered student homeless). IHSAA executive director Beste argued it is the district's obligation to notify the Board a student is homeless, not the Board's obligation to ask. This is an unpersuasive argument. First, he could not say how a district would do so. Second, the Board has an obligation to consider and apply all exceptions. *See* Iowa Admin. Code r. 281-36.15(3)(a). Third, it is particularly unpersuasive in this case, where the Board provided an incorrect statement of law that omitted this exception in its communication with appellant.

Lastly, if no other exception presented itself, [redacted] could fall under the catch-all provision. *See id.* r. 281-36.15(3)(a)(9). It is perplexing that the Board concluded [redacted] did not satisfy this provision. This student is fleeing gang violence, returning from a residential treatment facility, and seeking a new home with family. There is no indication the move was principally or solely for school or athletic purposes. It is undisputed [redacted] is an average athlete. It is not "fair and reasonable," *id.*, to deny [redacted] an opportunity to play varsity sports immediately.

The Board found no "compelling" reason to apply the exception to grant [redacted] immediate varsity eligibility. Yet nothing in the exception requires a "compelling" basis. This heightened standard should be rejected. *See Thor L.*, 27 D.o.E. App. Dec. at 536 ("It was error for the Board to make a decision based on lack of danger of immediate and identifiable irreparable harm to Thor. No such language is in any part of the General Transfer Rule.").

Beste's testimony raised additional questions about the IHSAA's consideration of the catch-all exception. Beste gave no satisfactory answer regarding the policy basis for the ninety-day rule, instead saying the IHSAA administers the rule because the rule exists. [redacted] and his witnesses, both at the Board hearing and the hearing before the undersigned, asserted the rule exists to prevent school jumping and recruitment of athletes. Several state courts agree with them. *See Parker ex rel. Parker v. Ariz. Interscholastic Ass'n, Inc.*, 59 P.3d 806, 813 (Ariz.

Ct. App. 2002); *Ind. High School Athletic Ass'n, Inc. v. Martin*, 731 N.E.2d 1, 10-11 (Ind. Ct. App. 2000); *Berschback v. Grosse Pointe Pub. Sch. Dist.*, 397 N.W.2d 234, 241 (Mich. Ct. App. 1986); *Miss. High School Activities Ass'n, Inc. v. Coleman by and on behalf of Laymon*, 631 So. 2d 768, 775 (Miss. 1994); *Albany Acads. v. N.Y. State Pub. High School Athletic Ass'n*, 145 A.D.3d 1258, 1261 (N.Y. App. Div. 2016); *Hebert v. Ventetuolo*, 480 A.2d 403, 408 (R.I. 1984); *Simkins by Simkins v. S.D. High School Activities Ass'n*, 434 N.W.2d 367, 369 (S.D. 1989). In prior decisions, the Department has agreed with them, too. *See In re Cooper Rose*, 22 D.o.E. App. Dec. 242, 246 (2004); *Douglas Gillett*, 21 D.o.E. App. Dec. at 223; *In re Jared Lovelady*, 19 D.o.E. App. Dec. 140, 144 (2000) ("Residency/transfer rules limiting the eligibility of student athletes ostensibly exist to deter two conditions: the recruiting of athletes by high schools or colleges which the student-athlete does not in fact attend, and the shopping around by student-athletes for institutions which seem to offer the best opportunities to advance the student's athletic career." (quoting Rapp, J., *Education Law*, Vol. I, section 3.09(4)(a)(i), Matthew Bender, 1995)). The IHSAA's brief asserts "the overriding purpose of the rule is deterrence and the rule is to be applied to all students." Deterring school jumping and recruitment is a reasonable purpose, but it does not serve that reasonable purpose to suspend [redacted] from varsity interscholastic athletics, when no evidence in the record shows he is school jumping, has been recruited by [redacted], or plans to advance his athletic career beyond playing with his friends. (And, of course, the rule must be applied to all students. But that application includes considering the rule's exceptions.)

Beste was asked if it was unduly punitive to suspend [redacted] for the entire summer baseball season, when [redacted] had no opportunity to "pay down" his school-days suspension, on top of most of the football season, given that [redacted] enrolled in school in February. Most cases in the Department annals begin with a student transferring at the start of a school year and missing the entire fall sports season and part of the winter season—like this case—while simultaneously "paying down" the suspension—unlike this case.[2] Beste testified this consideration did not factor into the Board's decision. Yet this seems like exactly the type of consideration one might make to be "fair and reasonable." Iowa Admin. Code r. 281-36.15(3)(a)(9).

Beste testified to something susceptible to two meanings. His testimony was:

[2] Several cases involve students transferring in the spring, but those students made no assertions about wanting to play both a summer and fall sport (and thus serving a suspension, in varsity games missed, as onerous as [redacted] would be). *See, e.g.*, *Austin Trumbull*, 26 D.o.E. App. Dec. at 101 (baseball only); *In re Chase Hirschauer*, 25 D.o.E. App. Dec. 159, 161 (2009) (same). Perhaps the closest analogue is the student who transferred at the start of a school year to one (public) school, then transferred back to his original (private) school after forty days of school, and was suspended for an additional ninety days, for a total "suspension" of 130 school days. *See Jared Lovelady*, 19 D.o.E. App. Dec. at 145. In all likelihood, Lovelady missed an entire basketball season and most of a soccer season. *See id.* at 141. However, the precedential value of *Lovelady* is minimal because the regulation at the time was written to prohibit immediate eligibility for all public-to-private transfers, absent a "corresponding change of address." *See id.* at 141–42. In other words, no one had to consider whether the 130-day absence from varsity competition was "fair and reasonable."

> Q. The catch-all exception applies only to those situations which are not specifically referenced in the [Administrative] Code, don't they? A. That's correct.
>
> Q. So there is no authority for the Board to grant something if the rule says that only those ninety days count? A. Correct.
>
> Q. So if they did that, they'd be violating the rule? A. That is correct.
>
> Q. So that catch-all exception, which is now subsection nine, is only applied to situations which are not provided for in the transfer rule? A. That is correct.

One interpretation of this testimony is that the Board cannot consider whether this suspension is unduly punitive because the Board is empowered only to count school days and not actual days. Of course, this is false. The Board can grant immediate eligibility when it determines doing so is "fair and reasonable." Determining what is "fair and reasonable" necessarily evades blanket assertions about what factors may be considered because each case is unique.

The other possible interpretation is that the catch-all provision is separate and apart from the other exceptions, that it exists as a transfer rule unto itself. This is contradicted by the provision's placement under "exceptions" to the general transfer rule. It is belied by the Board's actions, which imposed a ninety-day suspension from varsity athletics—language that occurs only in the general transfer rule. *See id.* r. 281-36.15(3). And, since the general transfer rule applies to all transfers from other states, other countries, and other IHSAA member schools, this interpretation would effectively write the catch-all provision out of existence. *See id.* When interpreting a rule, it is assumed no part of the rule is superfluous. *See Exceptional Persons, Inc. v. Iowa Dep't of Human Servs.*, 878 N.W.2d 247, 251 (Iowa 2016) (discussing statutory interpretation); *City of Des Moines v. Emp't Appeal Bd.*, 722 N.W.2d 183, 196 (Iowa 2006) ("The same rules of interpretation that apply to statutes apply to regulations of an administrative agency."). This ninth exception is not a co-equal rule with the general transfer rule; it is an exception thereto. *See Malcolm Bevel*, 21 D.o.E. App. Dec. at 190–91 (rejecting IHSAA's argument otherwise).

These various arguments, interpretations, and actions by the IHSAA strongly suggest issues with how the catch-all provision was applied in this case. The Board required a "compelling" basis to apply a rule that requires no such finding. It ignored the purposes of the transfer rule to suspend an average athlete whose transfer was undisputedly not primarily for athletic purposes. It made no attempt to engage with the unique circumstances of this case while making an ostensibly "fair and reasonable" judgment. And it did all that in service of suspending a teenager adrift and looking for a second chance, in the name of "the spirit of the General Transfer Rule." That decision is now reversed.

DECISION

For the foregoing reasons, the June 18, 2018 decision of the Iowa High School Athletic Association that [redacted] is ineligible to compete in interscholastic athletic contests and

competitions for ninety consecutive school days at [redacted] High School is **REVERSED**. There are no costs associated with this appeal to be assessed 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 act shall be so considered.

Dated this 10th day of August, 2018.

Joseph D. Ferrentino
Administrative Law Judge