IOWA STATE DEPARTMENT OF EDUCATION
(Cite as 13 D.o.E. App. Dec. 83)

In re Brett Johnson	:	
Steve Johnson, Appellant,	:	
v.	:	DECISION
Iowa High School Athletic Association, Appellee.	:	[Admin. Doc. #3670]

The above-captioned matter was heard telephonically on September 6, 1995, before a hearing panel comprising Dr. David Wright, Office of Educational Services for Children, Families, and Communities; Dr. Mary Thissen-Milder, Bureau of Instructional Services; and Ann Marie Brick, J.D., legal consultant and administrative law judge, presiding. Appellant, Steve Johnson, was "present" by telephone, unrepresented by counsel. Appellee, Iowa High School Athletic Association [hereinafter the "IHSAA"], was also "present" on the telephone, in the person of Bernie Saggau, also *pro se*. Mr. Neil Moritz, superintendent of Hawarden-West Sioux Community School District, was also present and testified on behalf of Appellant Johnson.

An evidentiary hearing was held pursuant to Departmental Rules found at 281--Iowa Administrative Code 6. Authority and jurisdiction for the appeal are found in Iowa Code §256.46 and Chapter 6 of the Iowa Administrative Rules. Appellant seeks reversal of the decision of the Board of Control of the Iowa High School Athletic Association, made on August 16, 1995, denying his request to allow his son to play in IHSAA-sponsored baseball in the father's resident district. He wants his son to be eligible to play beginning in the summer of 1996 and each following summer for as long as his son attends high school and is otherwise eligible.

I.
Findings of Fact

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

Appellant Steve Johnson and his wife lived together in Hawarden, Iowa, until they divorced in 1985. At that time, their son, Brett, was only four years old. The day after the divorce decree was finalized, Ms. Johnson moved with their son to

Dubuque, Iowa, 350 miles away. In spite of the separation, Steve Johnson established the habit of calling his son on an almost-daily basis. Mr. Johnson testified that between vacations and other obligations that made daily contact impossible, he estimates that he and his son talked on the average of 5 times per week over the past eleven years.

The original divorce decree gave primary custody to Ms. Johnson with liberal visitation rights to Appellant. He was to see Brett on every other weekend and have custody of him on alternate holidays and for six weeks during the summer. However, when Ms. Johnson moved to Dubuque, Appellant was unable to exercise his visitation rights except over Christmas vacation and during the summer.

As time went on, it became evident that Brett was becoming a gifted athlete. He seemed to excel at baseball and basketball. This is consistent with the fact that his father is the baseball coach for the Hawarden-West Sioux Community School District. In 1990, when Brett was nine years old, Appellant successfully filed for a modification of custody to have Brett for eight weeks instead of only six weeks during the summer. Appellant read from the court's 1990 modification decree which extended his summer visitation. In so doing, the court recognized the need for the father and son to share their interest in sports and stated:

> The Respondent is seeking additional summer visitation, but primarily wants the visitation to occur at the beginning of the summer. The Respondent's position is that he is the baseball coach for Hawarden High School and that if summer visitation was at the beginning of the summer, he would have the opportunity to have Brett with him while he coaches the high school team. This would allow Brett to observe the Respondent at his work as well as to benefit from the experience of being around a high school team during the baseball season. ... The Respondent believes that because of the Respondent's and Brett's strong interest in baseball, that he and Brett could develop a more meaningful and deeper relationship if Brett were with him during the baseball season. The Court agrees with the Respondent and finds that it would be in the best interest of Brett to have the opportunity to be with his father during the baseball season for those reasons outlined above. ... This activity together would more likely facilitate the bonding of the father-son relationship than any other activity that might occur later in the summer.

Modification Decree, filed July 18, 1990, (Michael Walsh, Judge of the Third Judicial District).

This summer, during the 1996 baseball season, Brett had planned to play baseball for his father's team. Brett is now 15 years old and a freshman at Dubuque-Hempstead. After his visitation with his father last summer, Brett discussed these plans with his mother. Apparently, Ms. Johnson called the Dubuque-Hempstead High School coach and asked for a clarification on Brett's eligibility to play at his father's school. This was how the issue came to a head last August, culminating in an appeal to the IHSAA Board of Control.

Speaking on behalf of the IHSAA, Bernie Saggau testified that although he is very sympathetic to Appellant's situation, Brett cannot play for his father during the summer months because Brett is not a student at the Hawarden-West Sioux Community School District. "There is nothing in the rules to give authority to the Athletic Association to do otherwise." In addition, Mr. Saggau commented that there are so many situations where kids change their residence during the summer and want to play sports; they either move to the lake for the summer or go to live with grandparents and want to play on teams that do not represent their school of attendance. Mr. Saggau was adamant that the way the rules are presently written, they do not provide for a student to play ball for a school which is not the "school of attendance."

Appellant, for his part, argues that an exception should be made in a situation like this because it puts both the non-custodial parent and the child in an untenable position. His son is a talented baseball player who hopes to play college ball one day. Appellant testified that as much as these summer visits mean to him, he would never ask his son to make a choice between playing baseball and exercising his visitation rights. He would never ask his son to give up baseball -- therefore, he and Brett would lose their only extended time together.

Mr. Neil Moritz, superintendent of Hawarden-West Sioux Community School District, testified on behalf of Appellant. He stated that residency is always at the forefront of decisions concerning public education and children. "When we are looking at a court-ordered residency change, I think these are things that fall outside the realm of control on the part of children. ... I think we have a morale obligation to take a look at that -- how we might make things work in a situation like this."

II.
Conclusions of Law

Iowa Code § 256.46 (1995) specifically addresses this situation. Passed in its present form in 1993, it requires the State Board of Education to adopt rules "that permit a child who does not meet the residence requirements for participation in extra-

curricular interscholastic contests or competitions sponsored or administered by [IHSAA] ... to participate in the contests or competitions ***immediately*** if the child is duly enrolled in ***a school***, is otherwise eligible to participate, and meets one of the following circumstances or a similar circumstance:

1. The child has been adopted;
2. The child is placed under foster or shelter care;
3. **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;**
4. The child is a foreign exchange student;
5. The child has been placed in a juvenile correctional facility;
6. The child is a ward of the court or the state;
7. The child is a participant in a substance abuse program; or
8. The child is a participant in a mental health program. ...

Id. at §256.46.

In accordance with the legal mandate to adopt rules to implement this Code section, the State Board of Education adopted 281--IAC 36.15(3)(b)(3). The complete text of this rule states:

> Pursuant to Iowa Code §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 recognized by the school of attendance.
> 4. Placement in a juvenile correctional facility.
> 5. participation a substance abuse program.
> 6. Participation a mental health program.
> 7. Court decree that the student is a ward of the state or the court.

Id.

At the appeal hearing, the IHSAA argued that there is no provision in the eligibility rule [281--IAC 36.15(3)(b)(3)] [hereinafter "the rule"] just referenced which would allow Appellant to play baseball for his Dad's resident district because it is not his "school of attendance." Additionally, the IHSAA contends, Appellant does not fit one of the seven circumstances enunciated in the rule.

We would agree with the IHSAA that by the terms of this rule, Appellant would not be eligible to play baseball in his father's resident district. However, the rule cannot be enforced in this manner because to do so, would conflict with the plain terms of Iowa Code § 256.46.

The Iowa Code provides for ***eight*** circumstances in which a child who does not meet residency requirements may be immediately eligible to play in sports sponsored by the IHSAA or the IGHSAU. The athletic eligibility rules are intended to implement, not contradict, the Iowa Code. However, this rule does the latter. Notably absent from the rule is the eligibility provision for the student enrolled in "a school"[1] who "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... . Iowa Code § 256.46 (1995).

> The primary function of an administrative agency is to execute the will of the legislature and the legislature may authorize an agency to establish rules and regulations for the administration of a statute in order to give effect to legislative policies. (Citations omitted.) However, under its power to make rules and regulations, an agency may not adopt any which contravene or conflict with the statute, are inconsistent with the design and purpose of the statute, or which extend, limit or alter the statute. Dumain v. Carrey, 499 N.Y.S.2d 334, 337 (Sup. 1986), 30 Ed. Law Rep. 1253, 1256; see also, Havner v. Meno, 867 S.W.2d 130, 88 Ed. Law Rep. 456 (Tex. 1993)("agency cannot adopt rules that are inconsistent with statute"); Special School Dist. No. 1 v. Dunham, 498 N.W.2d 441 (Minn. 1993)(statute controls if administrative rule conflicts with plain meaning of statute); Ferro v. Utah Dept. of Commerce, Div. of Occupational and Professional Licensing, 828 P.2d 507, 73 Ed. Law Rep. 1149 (Utah App. 1992)(agency

[1]This language is also broader than the rule's requirement that the student meet all eligibility rules "set by the school of attendance." The reason the rule is more restrictive than the Law is because one of the rules set by every school of attendance is that in order to compete on the school's athletic team, the student must be in attendance at that school.

> regulations may not abridge, enlarge, extend, or modify a statute creating a right or imposing a duty; it is statute, not agency rule, that governs and if the agency regulations is not in harmony with the statute, it is invalid).

When in conflict, the provisions of the Iowa Code supersede those of the Administrative Rules which are promulgated to implement the Code. This rule, promulgated by the State Board of Education, cannot be used to prevent the participation of Appellant in his father's resident district's baseball team in the face of the Legislature's clear intent to provide eligibility in situations like this. 281--IAC 36.15(3)(b)(3) should be amended to reflect that legislative intent.

In the meantime, those students who are visiting their non-custodial parent during the summer as the result of a divorce decree should be accorded the rights provided to them under Iowa Code § 256.46.

Any motion or objections not previously ruled upon are hereby denied and overruled.

III.
Decision

For the foregoing reasons, the August 16, 1995, decision of the Board of Control of the Iowa High School Athletic Association, to deny the request for eligibility for Brett Johnson to play baseball for his father's resident district beginning in the summer of 1996, is hereby recommended for reversal. There are no costs to this appeal to be assigned.

3/6/96
DATE

ANN MARIE BRICK, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

3/6/96
DATE

TED STILWILL
DIRECTOR