IOWA DEPARTMENT OF EDUCATION

(Cite as 29 D.o.E. App. Dec. 355)

In re: Athletic Eligibility of D.M.	)	
	)	Case No. 21DOEAE0004
Prince of Peace Catholic School, Appellant,	)	DE Admin. Doc. No. 5126
v.	)	**DECISION**
Iowa High School Athletic Association, Appellee.	)	

STATEMENT OF THE CASE

This matter was heard via telephone hearing on October 16, 2020, by Joseph Ferrentino, designated administrative law judge with the Iowa Department of Inspections and Appeals, presiding on behalf of Dr. Ann Lebo, Director of the Iowa Department of Education (Department).

Jennifer Hansen-Wauford, the school's assistant principal and athletic director, represented the appellant. Attorney Brian Humke represented the Iowa High School Athletic Association (IHSAA). Other witnesses present were Tom Keating, executive director of the IHSAA; Jared Chizek, assistant director of the IHSAA; and Dr. Rod Earleywine, chairperson of the IHSAA Board of Control.

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 September 21, 2020, finding that D.M., a senior at Prince of Peace Catholic 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).

The following items were offered into evidence and admitted without objection, with Bates-stamped pages and timestamps provided as reference:

- Documents that had been made available to the Board (Ex. A, pp. 1–36);

- A copy of the decision of the Board signed by Chairperson Rod Earleywine (Ex. B, pp. 37–41);
- Minutes of the September 14, 2020 Board meeting (Ex. C, p. 42);
- A recording of the hearing before the Board (Ex. D, 0:00–6:24);
- A May 18, 2020 email sent to athletic directors by the IHSAA (Ex. E, pp. 43–45); and
- An affidavit written by Hansen-Wauford (Ex. 1, pp. 1–2).

The IHSAA requested time to submit a post-hearing brief. *See* Iowa Admin. Code r. 281-6.12(2)(n). The record was held open through October 26 for briefing. The IHSAA submitted a brief. The appellant did not. The record was then closed.

FINDINGS OF FACT

D.M. is an international student, but not a foreign exchange student, from Aruba. (Ex. A, p. 1). He is a senior. (Ex. B, p. 37; Ex. D, 1:42). For the 2019-20 school year, he attended Clinton High School (Clinton) on an F-1 visa. (Ex. A, p. 1; Ex. B, p. 37; Ex. D, 0:25). The F-1 visa prohibits international students from attending a public high school in the United States for more than one year, but has no such restriction on private schools. 8 C.F.R. § 214.2(f)(5)(i). D.M. made plans to transfer. (Ex. A, p. 21; Ex. B, p. 37, Ex. D, 0:07–0:55). Aruba has a school system that ends in tenth grade, so that option was not available to him. (Hansen-Wauford testimony). Public schools were not available to him because of his visa. 8 C.F.R. § 214.2(f)(5)(i). Prince of Peace Catholic School (Prince of Peace) is the only private K-12 school in Clinton, where D.M.'s host family lives. (Hansen-Wauford testimony). D.M. arranged to transfer to Prince of Peace. (Ex. A, p. 21; Ex. B, p. 37; Ex. D, 0:07–0:55).

D.M. is also a talented basketball player. (Ex. D, 1:43; Ex. 1, p. 1). When he arrived at Clinton, he was subject to the general transfer rule, which requires that student-athletes serve a ninety-school-day suspension upon a transfer, unless an exception applies, before participating in varsity athletes. (Ex. B, p. 37; *see* Iowa Admin. Code r. 281-36.15(3)). Presumably, D.M. learned from that suspension and, facing a federally mandated transfer to a private school, he and his father made plans for him to transfer to Prince of Peace in the spring of 2020. (Ex. A, p. 21; Ex. D, 0:07–0:20, 0:30–0:35). In doing so, D.M. could serve the ninety-school-day suspension before the 2020-21 basketball season began.

D.M. was accepted at Prince of Peace in February 2020. (Ex. A, p. 21; Ex. D, 0:36–0:44; Ex. 1, p. 1). Clinton provided D.M.'s records to Prince of Peace. (Ex. A, pp. 21, 27–35; Ex. D, 0:44–0:50). Prince of Peace is on a quarter schedule. (Ex. A, p. 21; Ex. D, 0:51). The fourth quarter of the academic year began on March 30, 2020. (Ex. A, p. 21; Ex. D, 0:51). Prince of Peace and D.M. agreed he would begin at the start of the fourth quarter to ease his transition and "start fresh" after third-quarter exams. (Ex. A, p. 21; Ex. D, 3:57–4:33). However, in between D.M.'s acceptance at the school and the start of the fourth quarter, Prince of Peace transitioned to virtual learning, due to the ongoing coronavirus pandemic, in accordance with Governor Reynolds' decision to close schools for in-person learning. (Ex. A, p. 21; Ex. B, p. 38; Ex. D, 0:54–1:02; Ex. 1, pp. 1–2; *see also "Gov. Reynolds recommends Iowa schools close for four weeks, will hold a press conference tomorrow," https://governor.iowa.gov/press-release/gov-*

reynolds-recommends-iowa-schools-close-for-four-weeks-will-hold-a-press-0 (Mar. 15, 2020) (last accessed Oct. 26, 2020)). Prince of Peace determined this transition—to a new school, with new teachers, online, with no in-person contact with new classmates or teachers—would not be in D.M.'s best interests as a student and decided he would not be admitted for the fourth quarter of the 2019-20 school year. (Ex. A, p. 21; Ex. D, 1:02–1:30; Ex. 1, pp. 1–2). Notably, Prince of Peace was aware at the time D.M. was "a good basketball player." (Ex. 1, p. 1). D.M. finished the school year at Clinton. (Ex. A, p. 21).

At the start of the 2020-21 school year, D.M. enrolled at Prince of Peace. (Ex. A, p. 21; Ex. D, 1:37–1:42). On August 27, Prince of Peace, by Jennifer Hansen-Wauford, applied for an eligibility ruling. (Ex. A, p. 24). The IHSAA decided D.M. was ineligible for ninety school days. (Ex. A, p. 19). The school appealed that decision to the Board. (Ex. A, p. 17). The Board held a hearing on the matter on September 14. (Exs. B–D). On September 21, the Board issued its decision, which held, in relevant part:

> In this case, [D.M.] was set to transfer to Prince of Peace at the beginning of the fourth quarter of the 2019-20 school year. However, he never attended Prince of Peace during the 2019-20 school year as the Prince of Peace administration made the decision not to allow him to enroll at the school because of the pandemic. The appellant asks the Board to grant [D.M.] credit for the fourth quarter of [the] 2019-20 school year as he was prepared to transfer.
>
> The calculation of the ninety school days of ineligibility begins from the first day of attendance at the school the student transfers to. The Board of Control cannot give credit for attendance at a school during the time the student was not enrolled and did not attend. [D.M.]'s ninety days of ineligibility shall run from the first day of attendance at Prince of Peace High School.
>
> The Board believes this decision is fair and reasonable.

(Ex. B, p. 40). Prince of Peace appeals.

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 here is for abuse of discretion. *In re A.T.*, 29 D.o.E. App. Dec. 241, at *1 (2019). *But see In re T.M.*, 29 D.o.E. App. Dec. 38, at *6–8 (2018). "An abuse of discretion occurs when the agency action 'rests on grounds or reasons clearly untenable or unreasonable.'" *Dico, Inc. v. Emp't Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998) (internal citation omitted). "An abuse of discretion is synonymous with unreasonableness." *Frank v. Iowa Dep't of Transp.*, 386 N.W.2d 86, 87 (Iowa 1986). Unreasonableness means "action in the face of evidence as to which there is no room for difference of opinion among reasonable minds or not based on substantial evidence." *Id.* Unreasonableness and abuse of discretion are "premised on lack of rationality, and focus[] on whether the agency has made a decision clearly against reason and evidence." *Id.* "A failure to exercise discretion is an abuse of discretion." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 631 (Iowa 2000).

Discussion

The general transfer rule 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:
>
> . . . .
>
> (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.

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" and "the motivating factors for the student transfer." *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.* The Board's decision must be "fair and reasonable" and "shall be made in writing with the reasons for the determination clearly delineated." *Id.*

Here, D.M. is a transfer student. Only the ninth, catch-all, exception was at issue before the Board and no evidence was presented to suggest another exception would apply. (There is an exception that concerns foreign exchange students, *see* Iowa Admin. Code r. 281-36.15(3)(a)(4)(3), which is why it matters that D.M. is not a foreign exchange student. *See In re Johannes K.*, 23 D.o.E. App. Dec. 329, 334–35 (2005) (discussing differences).) The question for this tribunal is whether the Board abused its discretion—that is, acted unreasonably—in denying D.M.'s request for an exception to the general transfer rule.

Based on the rule's requirements, the undersigned concludes the Board abused its discretion in denying the request.

The student seeking an exception must show that the transfer is "not solely for school or athletic purposes." The Board implicitly has a duty to make a finding on that issue. Here the Board did not do so. The Board's decision is silent on D.M.'s motivation.

Although not "clearly delineated" in writing as required by the rule, the Board's opinion of D.M.'s motivation became evident at the director hearing. Dr. Earleywine testified it was "pretty evident" to the Board that D.M.'s decision to transfer in March was motivated by his desire to play a full season of varsity basketball. That appears to be true—Ms. Hansen-Wauford said as much at the director hearing, too. But what of it? The general transfer rule offers student-athletes a deal: if you are willing to sit out ninety school days, you can transfer. No one violates the rule by planning a transfer strategically. The rule allows it. If this case were about a successfully effectuated March transfer, we wouldn't be having this hearing, because D.M. would be eligible, without the aid of any exception, in time for basketball season.

All of the above is true in every case, but in this specific case we also have evidence the transfer was not "solely for school or athletic purposes." Specifically, the transfer was mandated by federal immigration law. That's a strong motivation outside of school or athletics. There is no evidence the Board considered it.

When the Board failed to consider whether the transfer was "solely" for school or athletic purposes, it shifted the burden to such a degree the burden becomes virtually impossible for any student-athletes—who, by definition, participate in school and athletics—to meet. This burden-shifting is an abuse of discretion.

The Board also has a duty to make a "fair and reasonable" decision when the ninth, or catch-all, exception is implicated. The Board here failed to do so.

The undersigned takes no issue with the Board's decision that "[t]he calculation of the ninety school days of ineligibility begins from the first day of attendance at the school the student transfers to." As even Ms. Hansen-Wauford concedes, in any other non-pandemic year, that would unquestionably be the rule. It is not unreasonable for the Board to conclude the same goes in a pandemic year.

But that does not answer the question in full. The Board reasonably decided not to credit D.M. for days he did not attend Prince of Peace. So far, so good. The next question is, as it is in every ninth-exception case, whether to grant an exception because doing so is fair and reasonable. It may be unreasonable to extend credit backwards, but there may yet be other reasonable bases to grant the exception. The Board has an affirmative duty to make a "fair and reasonable" decision, not just to reject any unreasonable arguments advanced before it. *See* Iowa Admin. Code r. r. 281-36.15(3), (3)(a)(9) ("The executive officer or executive board shall consider and apply the following exceptions" and "shall exercise its administrative authority to make any eligibility ruling which it deems to be fair and reasonable").

Consider the case without reference to any "credit" for days D.M. did not attend Prince of Peace. D.M. transferred at the start of the 2020-21 school year. Whether to transfer was not fully his choice because the federal government mandated it. He would have transferred earlier—and the Board would have never heard about him—but for (a) a pandemic and (b) a school that put his academic interests first. It is unreasonable to deny an exception under these circumstances.

The IHSAA routinely opines that participation in athletics is a privilege, not a right. This statement seems to reflect a belief that rights inure automatically, while privileges are rewards for good behavior. To deny a privilege, therefore, one would expect a failure to live up to obligations or expectations. Here there is no such failure on D.M.'s part. He arrives at Prince of Peace tempest-tossed by immigration law and a pandemic. How has he failed to live up to his end of the bargain? The Board gives no answer.

The purpose of the transfer rule is to deter school jumping and recruitment. Here it serves neither of those purposes to deny an exception. The IHSAA argues in its brief that D.M. is school jumping. "School jumping" has been defined as "changing from school to school because of athletic rather than academic reasons." *Josephine Cty. Sch. Dist. No. 7 v. Or. Sch. Activities Ass'n*, 515 P.2d 431, 438 (Or. Ct. App. 1973). D.M. is not school jumping. He is transferring because he is legally obligated to.

Prince of Peace's "recruitment" consisted of (a) being the only private school in town and (b) delaying D.M.'s admission, despite his athletic ability, once the pandemic hit Iowa. The former cannot be deterred by this decision; the latter *is itself* deterrence. Indeed, the idea that schools will always put athletics over academics if free to do so forms the basis for the transfer rule. When a school is aware of a talented athlete and chooses to sacrifice whatever glory accrues to the school from the athlete's talent to instead focus on how best to serve the student's academic interests, that behavior is squarely in line with the purpose of the transfer rule. Moreover, that behavior is in line with the purpose of the Department of Education and the director's duties. *See* Iowa Code §§ 256.1, .9. The behavior should be encouraged. Here the way to encourage it is to grant an exception to the transfer rule.

Finally, the IHSAA seeks to add language to the transfer rule that requires that the basis for the transfer be to avoid "immediate and identifiable irreparable harm." This language appears nowhere in the rule. The rule does not require as much. This is not the venue for amending the language of the rule. The undersigned declines to adopt this extraneous language. *See In Thor L.*, 27 D.o.E. App. Dec. 530, 536 (2014).

Truly, this is a unique case because of two highly unusual facts. The first is the reality of the F-1 visa mandating a transfer. In the annals of IHSAA athletics-eligibility decisions, only a handful concern F-visa students. *See In re Jose Pablo S.Q.*, 28 D.o.E. App. Dec. 299 (2018); *In re Johannes K.*, 23 D.o.E. App. Dec. 329 (2005); *In re Hon K.*, 23 D.o.E. App. Dec. 299 (2004); *In re Hanno J.*, 21 D.o.E. App. Dec. 198 (2002). And of those none concern students transferring because of their visa status. Jose Pablo and Johannes both requested immediate eligibility upon arrival in the United States (i.e., not a transfer). Their requests were denied and they were ineligible for varsity competition for ninety school days, as was D.M. last year when he arrived at Clinton. 28 D.o.E. App. Dec. at 300, 305; 23 D.o.E. App. Dec. at 330, 336. Hon attended three years of school in Iowa and did transfer between his first and second years, but his visa did not mandate the transfer. 23 D.o.E. App. Dec. at 299–301. Hanno wanted to be eligible for junior-varsity competitions, 21 D.o.E. App. Dec. 199, which the rule as written today does not prohibit. Iowa Admin. Code r. 281-36.15(3). These cases do not control the present one.

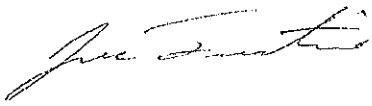
The second highly unusual fact is the existence of a unicorn school who denies admission to a talented athlete. Unsurprisingly, a search found no other case in which a school denied admission to a potential transfer student. (A keyword search for "pandemic" is similarly fruitless.) It seems highly unlikely the confluence of these two facts will exist again. In this fact-dependent case, the Board's decision is reversed.

DECISION

For the foregoing reasons, the September 21, 2020 decision of the Iowa High School Athletic Association that D.M. is ineligible to compete in varsity interscholastic athletic contests and competitions for ninety consecutive school days at Prince of Peace Catholic School is **REVERSED**. There are no costs associated with this appeal to be assessed to either party.

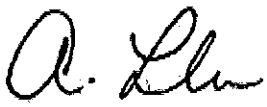
Any allegation not specifically addressed in this decision is either incorporated into an allegation that is specifically addressed or is overruled. Any legal contention not specifically addressed is either addressed by implication in legal decision contained herein or is deemed to be without merit. 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 fact shall be so considered.

Dated this 27th day of October, 2020.



Joseph D. Ferrentino
Administrative Law Judge

It is so ORDERED:



Ann Lebo, Director
Iowa Department of Education
October 29, 2020