IOWA DEPARTMENT OF EDUCATION

(Cite as 29 D.o.E. App. Dec. 347)

In re: Athletic Eligibility of R.P.	)	
	)	Case No. 21DOEAE0001
Jim P.	)	DE Admin. Doc. No. 5122
Appellant,	)	
v.	)	**DECISION**
Iowa High School Athletic Association,	)	
Appellee.	)	

STATEMENT OF THE CASE

This matter was heard via telephone hearing on October 6, 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).

The appellant, Jim P., was present, and testified. Attorneys Siobhan Briley and Ryan Prahm represented him and his son, R.P. Attorney Brian Humke represented the Iowa High School Athletic Association (IHSAA). Other witnesses present were Josh Bevins, territory manager for Riddell; Tom Keating, executive director of the IHSAA; Todd Tharp, assistant director of the IHSAA; Rod Earleywine, chairperson of the IHSAA Board of Control; and Casey Hack, activities director for Solon High School. All but Keating testified.

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 3, 2020, finding that R.P., a sophomore at Regina Senior 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).

The following items were offered into evidence and admitted without objection:

- Documents that had been made available to the Board (Ex. A);

- A copy of the decision of the Board signed by Chairperson Rod Earleywine (Ex. B);
- Minutes of the August 27, 2020 Board meeting (Ex. C);
- A recording of the hearing before the Board (Ex. D); and
- A National Operating Committee on Standards for Athletic Equipment ("NOCSAE") publication regarding helmet safety (Ex. 1).

The IHSAA requested time to submit a post-hearing brief. *See* Iowa Admin. Code r. 281-6.12(2)(n). The record was kept open for one day for briefing. Both parties submitted briefs. The record was then closed.

FINDINGS OF FACT

R.P. is a sophomore at Regina Senior High School (Regina) in Iowa City. (Ex. A, p. 1). Before this school year, R.P. attended Solon High School (Solon). (Ex. A, p. 1). R.P. plays football. (Ex. A, p. 6). R.P.'s father, Jim P. (Jim), has been a coach with Solon's middle school and youth football programs and has been actively involved with the game of football for many years. (Ex. A, p. 1; Ex. D, 8:12, 22:00–22:15). Jim came to believe Solon's football program failed to take seriously football-helmet safety. (Ex. A, pp. 1, 6–9; Ex. D, 0:00–21:40). Jim knows several of the coaches on the Regina staff and Regina's equipment manager and trusts them with his son's safety. (Ex. D, 9:16–9:54, 28:12–28:17, 31:07–31:29). This summer, R.P. transferred to Regina. (Ex. A, p. 6). The family did not move or change residences. (Ex. A, p. 1).

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. Iowa Admin. Code r. 281-36.15(3). Student-athletes may play junior varsity games and may practice with varsity teams but may not play in varsity games during this suspension period. *Id.*

The IHSAA initially determined R.P. was ineligible to participate in varsity sports on or about August 14. (Ex. B, p. 1). The family appealed that decision to the Board. (Ex. A, pp. 6–9; Ex. B, p. 1).

The Board, also known as the executive board, held its hearing on August 27. (Ex. B, p. 1). The Board had before it the following documents, which were made part of the record: letters from Jim setting forth his concerns with Solon's helmets; R.P.'s freshman transcript; a letter from Tharp explaining the appeal process; helmet inventory statements prepared by Bevins; and an invoice for services provided by Bevins. (Ex. A, pp. 1–26). At the hearing, one witness testified: Jim. (Ex. D).

The Board issued its ruling on September 3. (Ex. B, p. 6). Among its factual findings were the following:

> 5. The Iowa High School Athletic Association has been in contact with the athletic administration at Solon High School regarding this situation [i.e., Hack].

> 6. The Iowa High School Athletic Association has been in contact with the representative that has sold helmets and other protective equipment to Solon High School [i.e., Bevins].

(Ex. B, pp. 1–2).

When Earleywine testified before the undersigned, it became clear the IHSAA, in the form of Tharp, had "been in contact" and then some with Hack and Bevins. Earleywine conceded the inventory sheets in the record were, on their own, insufficient to reach a conclusion regarding Solon's helmet-safety process. Earleywine further stated the Board would have been unable to reach a conclusion about Solon's helmet-safety process without the information provided by Hack and Bevins (via Tharp). Said information was not relayed to Jim. Said information was not made part of the record. Said information was ex parte communication not subject to cross-examination by Jim. Earleywine believes Jim was given a chance to respond to the information provided to the Board because the Board asked Jim questions and Jim could answer those questions. No question was asked about the statements. Neither Hack nor Bevins testified at the Board hearing. Nothing in the Board's written decision indicates which facts, if any, were provided by Hack or Bevins. (Earleywine testimony; Ex. B; Ex. D).

The Board reached the following conclusions:

> Solon High School does not believe the helmets issued to the students are unsafe. The IHSAA has no information to indicate that Solon High School's helmet reconditioning[1] program is not currently in compliance with the appropriate standards.
>
> In this case, the transfer was a family decision based upon [Jim's] assertion and sincere [belief] that the football helmets were unsafe. [Jim] also testified that he had many friends on the staff of [Regina] and trusts them.
>
> The Board of Control finds that the transfer from Solon to [Regina] was for school or athletic reasons. In addition, the Board of Control and the Iowa 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.
>
> The transfer rules are enforced as a deterrent to school jumping and recruiting, but that does not mean that athletics need to be the reason for the transfer. The rules are applied to all students.
>
> In reviewing the evidence submitted and the motivating reason for the transfer, the Board determines that the exception requested by [Jim] to the General

[1] "Reconditioning" is the process by which older helmets are renewed and made safe for use again. (Bevins testimony).

> Transfer Rule should not be granted. The Board of Control believes its decision is fair and reasonable.

(Ex. B, p. 5).

Jim 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 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

As a starting point, let us consider what kind of agency action this is. Agency action comes in three forms: rulemaking, contested cases, and other agency action. *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 327 (Iowa 2015). By rule, neither the hearing before the Board nor the appeal to the director is a contested case proceeding. Iowa Admin. Code r. 281-36.17. "Rulemaking" is "the process for adopting, amending, or repealing a rule." Iowa Code § 17A.2(12). No rule is being adopted, amended, or repealed here. Neither party argues this is rulemaking. The undersigned concludes this process is not rulemaking.

That leaves "other agency action." This conclusion matters because "other agency action" does not entitle litigants to the same procedural protections as those afforded participants in contested case proceedings. In "other agency action" the Board "is subject only to those procedural rules which it may voluntarily adopt, the procedural requirements of its enabling

legislation . . . and general constitutional and statutory requirements that agencies act 'reasonably.'" *Allegre v. Iowa St. Bd. of Regents*, 349 N.W.2d 112, 116 (Iowa 1984); *see also Citizens' Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815, 817–20 (Iowa 1990) (contrasting contested cases, which "determine[] the rights of specific individuals based on their own particular facts and circumstances" and require evidentiary hearings, with other agency action, which does not).

The procedural rules and requirements of the Board are minimal and can be stated in full here:

> A student, parent of a minor student, or school contesting the ruling of a student's eligibility based on these rules . . . shall be required to state the basis of the objections in writing, addressed to the executive officer of the board of the governing organization. Upon request of a student, parent of a minor student, or a school, the executive officer shall schedule a hearing before the executive board on or before the next regularly scheduled meeting of the executive board but not later than 20 calendar days following the receipt of the objections unless a later time is mutually agreeable. The executive board shall give at least 5 business days' written notice of the hearing. The executive board shall consider the evidence presented and issue findings and conclusions in a written decision within 5 business days of the hearing and shall mail a copy to appellant.

Iowa Admin. Code r. 281-36.16.

Jim argues the process at the Board hearing was fundamentally unfair, pointing especially to the ex parte communication between Tharp and Bevins and Hack. Given these minimal standards, however, the undersigned cannot conclude the process here ran afoul of the Board's procedural rules or requirements or was an abuse of discretion as concerns the procedural rules or requirements. *See generally* Iowa Admin. Code agency 281, chapter 6 (providing for more robust proceedings in contested cases); *cf.* Iowa Admin. Code r. 281-36.17 ("The procedures for hearing adopted by the state board of education and found at 281—Chapter 6 shall be applicable" to hearings before the director.). For example, even though the rule provides that the Board "shall consider the evidence presented," in light of the fact that this action is other agency action, the word *evidence* is a misnomer, as no evidentiary hearing is required. *See Polk Cty. v. Iowa St. Appeal Bd.*, 330 N.W.2d 267, 277 (Iowa 1983) ("[I]t is a contested case if the constitution or a statute requires an *evidentiary* hearing. If the hearing required is not an evidentiary hearing, the adjudication is merely an informal adjudication and falls under the rubric of 'agency action.'" (emphasis in original) (internal citations omitted)). And while Jim is correct that ex parte communication is prohibited at this level, it was not prohibited at the Board level. Iowa Admin. Code r. 281-36.17 (applying rules to director hearings); *cf.* Iowa Admin. Code r. 281-36.16.

There remains, though, the question of whether the Board acted "reasonably," codified both by cases like *Allegre* and by the abuse-of-discretion standard of review. To consider that question, let us take up the substantive law.

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, R.P. 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. The

question for this tribunal is whether the Board abused its discretion—that is, acted unreasonably—in denying R.P.'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 found, instead, "that the transfer from Solon to [Regina] was for school or athletic reasons." That finding removes "solely" from the equation. That a transfer which finds its way to the Board is for school or, especially, athletic reasons is unsurprising. That is one purpose of the Board: to adjudicate transfer-rule exception requests for student-athletes. *See* Iowa Admin. Code r. 281-36.16. As a result, 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 uncontroverted evidence before the Board was that safety concerns motivated this transfer. The Board, in a sense, ruled that safety is not enough to justify an exception to the transfer rule. That leaves R.P. with two options this season: sit out the season at Regina, or play with equipment his family believes is unsafe at Solon. (Here it bears noting: the Board's written conclusions suggest the Board found credible both that (a) the helmets at Solon were not unsafe and that (b) Jim's belief the helmets were unsafe was sincere. Since both can be true, this opinion assumes those were the Board's findings. Were the family's belief not sincere, though, it would be a different case.)

The Board maintains it wants to deter school jumping and recruitment. Here, rather, it deters safety. The Board has ordered that students who leave a program they sincerely believe to be unsafe will be punished by sitting out ninety school days. Under the Board's decision, such a program has no incentive to change its ways. The Board's decision forces student-athletes to choose between the Scylla of potential serious injury due to unsafe equipment and the Charybdis of forfeiting a precious commodity: one season of their high school careers. It is not fair to put students in that position. It is not reasonable to put students in that position. The incentive to ensure safety should fall to the schools, which have superior resources. If a school is unwilling or unable to ensure safety, students, such as R.P., should be able to participate safely at another school without penalty. In determining it was "fair and reasonable" to put R.P. in this unenviable position, the Board abused its discretion.

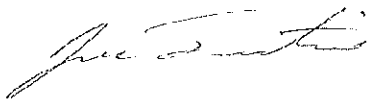
The Board's decision is reversed.

DECISION

For the foregoing reasons, the September 3, 2020 decision of the Iowa High School Athletic Association that R.P. is ineligible to compete in interscholastic athletic contests and competitions for ninety consecutive school days at Regina Senior 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 fact shall be so considered.

Dated this 8th day of October, 2020.

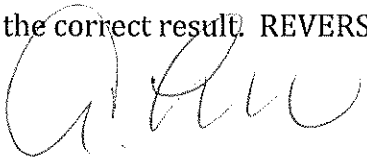


Joseph D. Ferrentino
Administrative Law Judge

Director's Review

On this 9th day of October, 2020, this matter comes to me under Iowa Code section 256.9(17) and Iowa Adminstrative Code rule 281—36.17. I adopt Judge Ferrentino's findings of fact, conclusions of law, and decision in their entirety. I write separately – not on matters of disagreement, but on matters that deserve additional emphasis.

As the administrative law judge notes, this decision is highly dependent on particular facts. Were the facts to differ, or had additional facts been offered, a different outcome might very well be "fair and reasonable" under Rule 36.15(3)(a)(9). As this decision is fact-dependant, it would not be enough to merely claim, in a future case, a concern for "safety." Concerns of safety must be sincere, as they are in this case, and must be not be a ruse or objectively unreasonable. Based on my review of the decision, the administrative law judge arrived at the correct result. REVERSED.



Ann Lebo
Director
Iowa Department of Education