

**IOWA DEPARTMENT
OF EDUCATION
(Cite as 24 D.o.E. App. Dec. 291)**

In re Petition for Waiver of Rule

Susan Noel,	:	ORDER DENYING
Petitioner,	:	WAIVER REQUEST
for a Waiver of Rule 36.15(2)	:	[Adm. Doc. #4651]

On or about May 10, 2007, Susan Noel filed a petition on behalf of her minor son, Christopher Noel, with this agency requesting a waiver from administrative rule 281-Iowa Administrative Code 36.15(2)"c".

Authority for filing and ruling on petitions for waiver is found in 281—IAC chapter 4. Because the petition herein was not filed within a contested case proceeding and because a hearing is not required by statute, rule, or order, no hearing was held. See 281—IAC 4.9. Per rule 4.10(7), the agency has 120 days to issue its decision. The agency considered the facts, the criteria for waiver in chapter 4, and the information submitted by interested persons in ruling on the petition.

**I.
FINDINGS OF FACT**

The facts underlying this petition are not disputed. Christopher is a student at Chariton High School. He participates in football and basketball. He incurred a shoulder injury during the 2006 football season, and was advised by treating physicians that he should not participate actively (as a player) in basketball for the 2006-07 school year. He was medically cleared to participate actively in sports on April 30, 2007.

Christopher received a failing grade for algebra for the first semester of the 2006-07 school year. But for the injury to his shoulder, Christopher would have been ineligible to compete as a member of the Chariton basketball team for the first 20 days of that sport following the issuance of his first semester report card. Because he was medically unable to compete, the school informed Christopher and Ms. Noel that the period of ineligibility would be applied to the first 20 days of the 2007 football season. Ms. Noel's petition for waiver asks that her son be excused entirely from serving any period of ineligibility for his "F" in algebra.

Pursuant to rule 281—4.8, this agency gave notice and opportunity to comment herein to officials of Chariton High School, the Iowa High School Athletic Association (IHSAA), the Iowa Girls High School Athletic Union (IGHSAU), the Iowa Association of School Boards, and School Administrators of Iowa. The latter two groups declined to respond. The principal and activities director of Chariton High School, as well as the executive directors of the IHSAA and IGHSAU, all recommended that the petition be denied. These responses were provided to Ms. Noel.

Richard Wulkow, executive director of the IHSAA, pointed out that "injury is part of sports, thus, waiving the penalty for ... injury ... would be a poor precedent." The IGHSAU's executive director, Troy Dannen, noted that Ms. Noel argued that the shoulder injury was a circumstance beyond her son's control. No one disputes this, but as Mr. Dannen stated, "[Christopher] is not

being denied football participation due to an injury, ... [but] is being denied football participation because he himself failed a class," and the "F" in algebra was totally within Christopher's control.

II. CONCLUSIONS OF LAW

The rule from which the Ms. Noel seeks waiver, 281—IAC 36.15(2)"c" is one of several eligibility requirements for high school students to be met as a condition of participation in interscholastic athletics. This particular rule is known as one of the "scholarship rules," and was amended by the State Board of Education effective with the start of the 2006-07 school year. The former rule required students to "pass four" courses to be eligible to compete in interscholastic athletics and set a consequence of one full semester of ineligibility. The new rule increased the standard to "pass all" courses, but softened the consequence so that the student is ineligible to dress for and compete in the next occurring interscholastic athletic contests and competitions in which the contestant is a bona fide contestant for 20 consecutive school days.

Rule 36.15(2)"c" states in pertinent part as follows:

- (1) Each contestant shall be passing all coursework for which credit is given and shall be making adequate progress toward graduation requirements at the end of each grading period. ...
- (2) [I]f at the end of any grading period a contestant is given a failing grade in any course for which credit is awarded, the contestant is ineligible to dress for and compete in the next occurring interscholastic athletic contests and competitions in which the contestant is a bona fide contestant for 20 consecutive school days. For purposes of this subrule, a "bona fide contestant" means a student who presently is or previously has competed in the interscholastic athletic activity to which the student's period of ineligibility herein applies. ...

This is the first petition of its kind that this agency has received since the rule was amended in March of 2006. When a petition for waiver is filed, rule 281—IAC 4.4 requires that the agency director must find all of the following criteria to be true:

1. The application of the rule to the petitioner would result in an undue hardship to the petitioner.
2. Waiver would not prejudice the substantial legal rights of any person.
3. The provisions of the rule from which waiver is sought are not mandated by statute or other provision of law.
4. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the rule from which waiver is sought.
5. Waiver would not have a negative impact on the student achievement of any person.

The burden of persuasion rests with the petitioner to demonstrate the above criteria by clear and convincing evidence. 281—IAC 4.10(2). If granted, a waiver shall provide the narrowest exception possible to the provisions of the rule. 281—IAC 4.10(3). The agency director may place any condition on a waiver that the director finds desirable to protect the public health, safety, and welfare. 281—IAC 4.10(5).

Because all five criteria must be satisfied, we need only examine the first criterion – *whether failure to grant a waiver would result in an undue hardship on the student* – in reaching our determination.

Ms. Noel states that failure to grant her son a waiver would deprive Christopher from participating in football during the 2007 season, a consequence to be imposed nearly a full year after his “infraction,” as she characterized the failing grade. True, but Ms. Noel overstates the effect on Christopher and fails to elaborate about how this is an undue hardship.

Christopher is not by any means the only student whose 20 days of ineligibility will occur many months after the failing grade was recorded. He will miss four of nine football games, not the entire season. If Chariton makes the playoffs, which it often does, he will be eligible for postseason play as well as the final five games of the regular season.

Given that there is no “right” of students to participate in interscholastic athletics [see *Brands v. Sheldon Community School*, 671 F.Supp. 627 (N.D. Iowa 1987)], the penalty to be served by Christopher does not result in an *undue* hardship to him or to any other student who fails a course. The whole point of the “pass all” rule is that there must be *some* consequence for failing grades; otherwise, the rule would be meaningless. Some hardship is built into the rule to drive home the point that academics take precedence over athletics. The consequence can hardly be said to be “undue.”

On the other hand, if the requested waiver is granted, Christopher Noel will have failed a class without having served any period of ineligibility from interscholastic athletics. This would be an unreasonable – indeed, an intolerable – result. The injury to Christopher is an unfortunate circumstance, but the failing grade is the entire reason the rule is being invoked and the grade is something over which he exercised control.

III. DECISION

For the foregoing reasons, the petition for waiver is DENIED. Christopher’s 20 school days of ineligibility are to be served during the 2007 football season. This year, that time period commences on August 30, 2007, the first day of allowable competition for football in Iowa.

This is final agency action, and may be appealed via a petition for judicial review pursuant to Iowa Code section 17A.19.

6-22-07
Date


Judy A. Jeffrey, Director