

**IOWA DEPARTMENT OF EDUCATION**

(Cite as 29 D.o.E. App. Dec. 363)

<i>In re: Athletic Eligibility of D.I.</i>	)	
	)	
Aaron I., Appellant,	)	Case No. 21DOEAE0007 DE Admin. Doc. No. 5131
	)	
v.	)	
	)	<b>DECISION</b>
Iowa High School Athletic Association, Appellee.	)	
	)	

**STATEMENT OF THE CASE**

This matter was heard via telephone hearing on November 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).

D.I.'s father, Aaron I., appeared personally and testified. Attorney Brian Humke represented the Iowa High School Athletic Association (IHSAA). Other witnesses present were Tom Keating, executive director of the IHSAA; Todd Tharp, 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 October 19, 2020, finding that D.I., a freshman at CAM High School, is ineligible to compete in varsity interscholastic athletics for ninety consecutive school days, under the provisions of the open-enrollment 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. 1–83);

- A copy of the decision of the Board signed by Chairperson Rod Earleywine (Ex. B, pp. 84–88);
- Minutes of the October 12, 2020 Board meeting (Ex. C, p. 89);
- A recording of the hearing before the Board (Ex. D, 0:00–16:41); and
- A letter in support of D.I. written by CAM High School Principal Dominic Giegerich (Ex. 1, p. 1).

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 November 9 for briefing. Both parties submitted briefs. The record was then closed.

### **FINDINGS OF FACT**

D.I. is a freshman at CAM high school. (Ex. A, p. 1). He attended a school in the Southwest Valley school district, where his family did and does live, for his eighth-grade year. (Ex. A, p. 63). D.I. and his family decided he would open-enroll into the CAM district for ninth grade. (Ex. A, p. 63). They completed the necessary paperwork for the open enrollment on or before March 1, 2020. (Ex. A, p. 63). Both school districts signed off on the transfer. (Ex. A, p. 64).

Despite this preparedness, D.I. was not convinced he would attend CAM. The deadline of March 1 compelled completion of the paperwork, but the final decision to attend was not made until much later. (Aaron I. testimony).

D.I. intended to play junior-high baseball over the summer. (Ex. A, pp. 28, 46). However, when the coronavirus pandemic hit Iowa, Governor Kim Reynolds canceled junior-high sports. (Ex. A, pp. 1, 28, 46). Subsequently, the coach of Southwest Valley’s junior-varsity team invited D.I. to play with the team. (Ex. A, pp. 1, 28, 46; Aaron I. testimony). He played a few games with the junior-varsity team to, as his father puts it, “get out and do something with someone other than his parents for the first time in months.” (Ex. A, p. 35). But for the pandemic, D.I. would have played junior-high baseball.

D.I. did ultimately elect to transfer to CAM for the 2020-21 school year. (Ex. A, p. 65; Ex. 1, p. 1). He also, unexpectedly, made CAM’s varsity football team. (Ex. A, p. 29). He sought to play varsity football for CAM this season. The IHSAA denied his request. (Ex. A, p. 4).

D.I. appealed to the IHSAA Board of Control, which held a hearing on October 12, 2020. (Ex. C, p. 89). Following the hearing, the Board issued its decision, which held, in relevant part:

[D.I.]’s parents made the election to enroll [D.I.] at CAM High School by use of the open enrollment statute. The Board is required to review the facts presented in light of the related administrative rules applicable to open enrollment in making its ruling.

The language of the rule is clear and unequivocal that participation in an interscholastic athletic competition for another school during the summer

immediately following eighth grade disqualifies [D.I.] from the exemption for students entering the ninth grade for the first time. In this case, [D.I.] participated in at least three such competitions for Southwest Valley High School.

The exceptions to the general transfer rule and the open enrollment rule are different and distinct. The Board is not allowed to consider or apply the exceptions of the general transfer rule in this situation. “In applying 281 IAC 36.15(4), there is no exception that allows the Board of Directors to look to the facts underlying the appeal.” *Hayek v. IHSAA*, 25 D.o.E. App. Dec. 198, 201 (2009).

The open enrollment statute was created by the Iowa General Assembly, codified as set out in Iowa Code § 282.18(13) and implemented by the Department of Education through administrative rules. The IHSAA has no authority to create additional exceptions to the statutory framework and cannot grant an exception that the lawmakers did not include themselves. The IHSAA is required to apply the rule of statutory construction which provides that if the legislature had intended to include immediate eligibility for students who open enroll for the reasons presented in this matter, the legislature would have so acted. *McGrath v. Iowa Board of Education*, 22 D.o.E. App. Dec. 79 (2003).

The Iowa Department of Education has held “only the Legislature has the power to write statutes and approve administrative rules. The Department can only apply the law that has been written.” *Drake v. IHSAA*, 26 D.o.E. Dec 489 (2014).

For the reasons stated above, it is the decision of the Board of Control that the previous ruling of the IHSAA staff that [D.I.] is ineligible to participate in varsity athletics for ninety school days pursuant to the open enrollment statute is hereby affirmed. If otherwise eligible, [D.I.] may participate at below the varsity level.

(Ex. B, pp. 87–88).

The family 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

The open-enrollment transfer rule provides:

**36.15(4) Open enrollment transfer rule.** A student in grades 9 through 12 whose transfer of schools had occurred due to a request for open enrollment by the student’s parent or guardian is ineligible to compete in interscholastic athletics during the first 90 school days of transfer except that a student may participate immediately if the student is entering grade 9 for the first time and did not participate in an interscholastic athletic competition for another school during the summer immediately following eighth grade. 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.) This period of ineligibility does not apply if the student:

- a. Participates in an athletic activity in the receiving district that is not available in the district of residence; or
- b. Participates in an athletic activity for which the resident and receiving districts have a cooperative student participation agreement pursuant to rule 281—36.20(280); or
- c. Has paid tuition for one or more years to the receiving school district prior to making application for and being granted open enrollment; or
- d. Has attended in the receiving district for one or more years prior to making application for and being granted open enrollment under a sharing or mutual agreement between the resident and receiving districts; or
- e. Has been participating in open enrollment and whose parents/guardians move out of their district of residence but exercise either the option of remaining in the original open enrollment district or enrolling in the new district of residence. If the student has established athletic eligibility

under open enrollment, it is continued despite the parent's or guardian's change in residence; or

*f.* Has not been participating in open enrollment, but utilizes open enrollment to remain in the original district of residence following a change of residence of the student's parent(s). If the student has established athletic eligibility, it is continued despite the parent's or guardian's change in residence; or

*g.* Obtains open enrollment due to the dissolution and merger of the former district of residence under Iowa Code subsection 256.11(12); or

*h.* Obtains open enrollment due to the student's district of residence entering into a whole-grade sharing agreement on or after July 1, 1990, including the grade in which the student would be enrolled at the start of the whole-grade sharing agreement; or

*i.* Participates in open enrollment and the parent/guardian is an active member of the armed forces and resides in permanent housing on government property provided by a branch of the armed services; or

*j.* Open enrolls from a district of residence that has determined that the student was previously subject to a founded incident of harassment or bullying as defined in Iowa Code section 280.28 while attending school in the district of residence.

Iowa Admin. Code r. 281-36.15(4); *see also* Iowa Code § 282.18(11)(a).

The key sentence is this: "A student in grades 9 through 12 whose transfer of schools had occurred due to a request for open enrollment by the student's parent or guardian is ineligible to compete in interscholastic athletics during the first 90 school days of transfer except that a student may participate immediately if the student is entering grade 9 for the first time and did not participate in an interscholastic athletic competition for another school during the summer immediately following eighth grade." *Id.* D.I.'s transfer of schools occurred due to a request for open enrollment by a parent. He is entering grade 9 for the first time. He did participate in interscholastic athletic competition for "another"<sup>1</sup> school during the summer immediately following eighth grade. Because of that participation, he may not participate immediately under the ninth-grade-exception clause. Therefore, he is ineligible unless one of the listed exceptions applies. None of the listed exceptions apply. He is ineligible.

The appellant argues for a "fair and reasonable" exception pursuant to the general transfer rule and its catch-all exception. *See* Iowa Admin. Code r. 281-36.15(3), (3)(a)(9). The general transfer rule applies to transfers that were not made as a result of open enrollment. It has a catch-all exception, unlike the open-enrollment transfer rule. That exception does not apply here. This argument is rejected.

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<sup>1</sup> Elsewhere in the rule, its drafters used "resident" or "receiving" to delineate which school they meant. Given that, the use of "another" here almost suggests a third-party school that is neither "resident" nor "receiving." The better reading, however, appears to be "a school that is not the receiving school."

The appellant cites earlier director decisions made during the coronavirus pandemic and argues that, as in those decisions, his son should be granted a special coronavirus exception. In particular, appellant cites *In re D.M.*, 29 D.o.E. App. Dec. 355 (2020). D.M.'s case proceeded under the catch-all exception to the general transfer rule, which, as stated above, is inapplicable here. The two cases are distinguishable on that ground. In neither case is there any kind of special coronavirus exception.

The appellant also argues, more generally, that the coronavirus pandemic makes this a unique situation meriting a one-time exception. No doubt this is a unique situation. But the law is not written in a way to permit an exception here.

The IHSAA, in contrast, cites *In re A.T.*, 29 D.o.E. App. Dec. 291 (2019), essentially for the proposition that sometimes its own rules produce bad results. Here, as in *A.T.*, multiple IHSAA witnesses testified the outcome was both regrettable and necessary. The Board applied the rule as written and the undersigned cannot conclude applying the rule as written is an abuse of discretion.

The legislature wrote the statute governing this issue. *See* Iowa Code § 282.18(11). Members of the public—and 501(c)(3) nonprofit organizations, provided such activity does not constitute a substantial part of their activities, 26 U.S.C. § 501(c)(3)—remain free to lobby their legislators for changes to laws.

The Board did not abuse its discretion in deeming D.I. ineligible. The Board's decision is affirmed.

### DECISION

For the foregoing reasons, the October 19, 2020 decision of the Iowa High School Athletic Association that D.I. is ineligible to compete in varsity interscholastic athletic contests and competitions for ninety consecutive school days at CAM High School is **AFFIRMED**. 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 9th day of November, 2020.



Joseph D. Ferrentino

Administrative Law Judge

It is so ORDERED:

A handwritten signature in black ink, appearing to read "A. Lebo". The signature is written in a cursive style with a large initial "A" and a long, sweeping underline.

Ann Lebo, Director  
Iowa Department of Education  
November 10, 2020