

In The Matter E.M.)	
Petitioner,)	
)	
and)	
)	CAUSE NO. 200921-200
The Indiana High School Athletic Association,)	
Respondent.)	
)	
Review Conducted Pursuant to Ind. Code)	
§ 20-26-14 et seq.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On or about August 12, 2020, E.M.’s (“Petitioner”) parents completed the student portion of an Indiana High School Athletic Association (“IHSAA”) Athletic Transfer Report (“Transfer Report”). The Transfer Report requested that the IHSAA make an athletic eligibility determination for the 2020–2021 school year relating to the Petitioner’s transfer. On August 17, 2020, Walnut Hills High School (“Walnut Hills”), the sending school, completed its portion of the Transfer Report. The receiving school, Penn High School (“Penn”), completed its portion of the Transfer Report on August 10, 2020.

On August 25, 2020, the IHSAA Assistant Commissioner determined that Petitioner’s transfer was a Rule 19-4 violation and ruled Petitioner was ineligible at the receiving school until August 10, 2021. The Petitioner appealed the Commissioner’s determination to the IHSAA Review Committee (“Review Committee”).

The IHSAA sent a letter to Petitioner acknowledging receipt of Petitioner’s request for appeal and set the matter for a hearing before the Review Committee for September 9, 2020. Following the evidence presented at the September 9, 2020 hearing, the Review Committee issued its ruling on September 21, 2020 upholding the decision of the Assistant Commissioner declaring that according to Rule 19-4 and Rule 17-7.4, Petitioner would not be fully eligible until August 10, 2021.

On September 21, 2020, the Petitioner appealed the Review Committee’s decision to the Indiana Case Review Panel (“Panel”), and the Panel notified the parties that it would review the decision during a Panel meeting. The Panel requested and received the record from the IHSAA

on September 25, 2020. On September 29, 2020, the Panel held a meeting¹, and based on a review of the record and applicable rules and laws, the Panel made the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Panel finds the following facts to be true and relevant to its decision.

1. Petitioner, a senior, lives with his father in Granger, Indiana. Petitioner attended Walnut Hills his freshman (2017-18), sophomore (2018-19) and junior years (2019-20). While at Walnut Hills, he played varsity football and track & field. He last participated athletically at Walnut Hills on November 1, 2019.
2. The Petitioner attended Walnut Hills, a public school which served his parents address. Petitioner transferred with a corresponding change of address. The Petitioner was a stellar player on his football and track & field teams. He was a starter on the football team and had colleges looking at him. (R. p. 32). The coach from Walnut Hills told the Petitioner he was one of eight finalists for a position on the Army team. (R. p. 40).
3. The Petitioner transferred to Penn, a public school in Mishawaka, Indiana that serves his father's residence. The Petitioner began attending Penn on August 10, 2020. After the end of the school year, the Petitioner's family became concerned that Walnut Hills would offer virtual instruction at the beginning of the 2020-21 school year due to the COVID pandemic. Once a decision was made by Walnut Hills to offer virtual instruction, the Petitioner and his family began researching options for the Petitioner to attend an in-person school for his senior year. The Petitioner had struggled with distance learning and wanted to find a school that would fit his unique educational needs. The Petitioner's family researched possible schools and ultimately chose Penn after learning about its academic opportunities as well as the chance for the Petitioner to live in the same town as his grandfather. The Petitioner's father had also heard about Penn from a classmate in college. The family ultimately made the decision that the Petitioner and his father would move to Granger, Indiana. Originally, the whole family intended to move together, but that plan was abandoned after the Petitioner's brother alerted the family to his concerns about the move. The family then decided the Petitioner's mother and brother would remain in Cincinnati, Ohio. The Petitioner's brother had a friend commit suicide and struggled with suicidal thoughts himself (R. p. 54). He too had experienced some bullying at school. (R. p. 54). He remained close to a girl friend at school and told his parents, "she is the only friend I have and she's the only reason I'm alive today." (R. p.

¹The following members participated in the meeting: Kelly Wittman (Chairperson), Mr. Ben Ballou, Ms. Laura Valle, Mr. Marques Clayton, Ms. Mary Quinn, Mr. Mickey Golembeski, and Ms. Kelly Bauder, staff attorney, was also present as legal counsel to the Panel. Mr. Marques Clayton abstained from voting.

54). The Petitioner's family wanted to move together to Granger but eventually decided to let the Petitioner's brother and mother stay behind to remain with his friend and provide the best possible environment for his mental health. (R. 54-55).

4. The Petitioner's father did have a discussion with the coach from Walnut Hills about playing football in Alabama. He explained that a parent of a child from a long-snapping camp offered to let him live with his family and play football there. The family did not consider this as an option. If the transfer was purely about athletics, going to Alabama where football was definitely going to be played and he was guaranteed a spot would be the first choice.
5. On August 7, 2020, Ohio announced there would be a six-game football season. (R. p. 40). The Petitioner, his family and the entire football community was concerned that football could be put on hold or cancelled across the United States. Schools were in an ever-changing environment with information changing daily at the beginning of the 2020-21 school year. In fact, Penn had a football player test positive for COVID and there was no guarantee they would start the football season. There is no evidence the Petitioner or his family contacted anyone at Penn to discuss transferring and playing football for the school. The Petitioner and family had made the decision to transfer prior to August 7, 2020.
6. The Petitioner was concerned that the Walnut Hills coach was having practices when the fields were supposed to be closed during the COVID pandemic. After the Petitioner pointed out the practices were not permissible, he started receiving harassment from several football players. The Petitioner's father sent a note to the athletic director about the harassment and bullying. (R. p. 46). The Petitioner was called a "pussy" and a "bitch" for refusing to participate in practices/workouts that were impermissible. (R. p. 52). After learning that the Petitioner was going to leave Walnut Hills, the football coach sent a text to the Petitioner that "you should be ashamed of yourself. You're turning your back on your teammates." (R. p. 49). The Petitioner's father had reported earlier bullying in December or January. (R. p. 50). The Petitioner's father made a formal report with the Cincinnati Public Schools' general counsel. (R. p. 51). The Petitioner had been working out with a speed and agility trainer and was pressured to work out with him at his gym and said some pretty insulting things. (R. p. 51 & 52).
7. On August 12, 2020, Petitioner's parents completed the Transfer Report and the Petitioner indicated the transfer was due to "family needs". The Petitioner's father indicated they wanted to get their son to a healthier environment. (R. p. 41). His parents also indicated they wanted to move closer to their 77-year-old grandfather.

8. Walnut Hills recommended Petitioner have no eligibility under Rule 19-4. Penn recommended Petitioner have full eligibility under Rule 19-5. Penn school officials testified they likely filled out the Transfer Forms incorrectly and should have requested a hardship transfer under Rule 17-8.1 (R. p. 53). Penn officials reached out to the Assistant Commissioner asking for advice on filling out the forms and were told that schools look for the best in people and the assistant commissioner said, it was their job to look for the worst in people. (R. p. 36). No one testified at the Review Committee hearing from Walnut Hills.
9. Walnut Hills and Penn did not sign the 17-8.5 *Verification* limited eligibility waiver.

CONCLUSIONS OF LAW

1. Any Finding of Fact that may be considered a Conclusion of Law shall be so considered. Any Conclusion of Law that may be considered a Finding of Fact may be considered as such.
2. Although the IHSAA is a voluntary not-for-profit corporation and is not a public entity, its decisions with respect to student eligibility to participate in interscholastic athletic competition are considered a “state action” making the IHSAA analogous to a quasi-governmental entity. IHSAA v. Carlberg, 694 N.E.2d 222 (Ind. 1997), *reh. den.* (Ind. 1998).
3. The Panel has jurisdiction in this matter. The Panel was established to review final student eligibility decisions with respect to interscholastic athletic competition. Ind. Code § 20-26-14. The Panel has jurisdiction when a student’s parent or guardian refers the case to the Panel not later than thirty days after the date of the IHSAA decision. Ind. Code § 20-26-14-6(b). In this matter, the Review Committee rendered a final determination of student-eligibility adverse to the Petitioner on September 21, 2020 and Petitioner sought timely review on September 21, 2020.
4. The Panel may uphold, modify, or nullify the IHSAA Review Committee’s decision. (Ind. Code § 20-26-14-6(c)(3)).
5. The Panel reviews the IHSAA determination for arbitrariness or capriciousness. See Carlberg, 694 N.E.2d at 233. A rule or decision will be found to be arbitrary and capricious “only when it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.” Id. (citing Dep’t of Natural

Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1007 (Ind. 1989).

6. There are two waivers available to students under the IHSAA Rules: a Limited Eligibility Waiver pursuant to Rule 17-8.5 and a General Waiver of an IHSAA Rule pursuant to 17-8.1. Neither school signed the *Verification*, so Petitioner did not qualify for a limited eligibility waiver pursuant to Rule 17-8.5.
7. Generally, a student seeking a Rule 17-8.1 waiver must prove by clear and convincing evidence that: the primary purpose of the Rule will still be accomplished if the Rule is not strictly enforced (Rule 17-8.1(a)); a waiver will not harm or diminish the Rule's purpose or spirit (Rule 17-8.1(b)); the student will suffer or be harmed if a waiver of the Rule is not granted (Rule 17-8.1(c)); and a hardship condition exists as defined in Rule 17-8.3 (Rule 17-8.1(d)).
8. The Panel finds that there is not compelling evidence that demonstrates the Petitioner's transfer was primarily for athletic reasons in violation of Rule 19-4. The burden of proof in those matters involving Rule 19-4 falls on the IHSAA and there was not sufficient evidence in the record to find a violation of the rule². There were certainly discussions about the reality of a football season at any school the Petitioner would attend given the COVID pandemic. There was no guarantee any school would have a football season or if it would be shortened. Certainly, the Petitioner wanted to play football and participate in track & field in his senior year, but that was not the primary reason for his transfer. He wanted to find a school that offered in-person instruction and an environment that was free from bullying.
9. The Review Committee issued findings that the family committed violations of Rule 17-7.4. The Petitioner and his family admitted to filling out the form incorrectly but there is no evidence that they intentionally provided false information. The decision on moving the family was fluid at the time the form was completed. The Panel does not find that is

²The Panel also notes that even after repeated concerns listed in orders and from communications to the IHSAA from the Chairperson, staff of the IHSAA continues to conduct themselves in a manner at hearings that is unprofessional. Laughing while a student is testifying about being bullied is both cruel and unprofessional. Additionally, berating a family about the validity of a son's depression and suicidal thoughts is not productive or professional. As the Panel has expressed, these hearings are opportunities for schools, administrators and IHSAA staff to serve as role models for children. While the Panel understands the nature of adversarial administrative proceedings, the biggest complaint from families appealing to the Panel is how poorly they were treated by IHSAA staff.

The Panel is also concerned that the Review Committee decision was based predominantly on hearsay evidence or conjecture. The Panel operates under the guidance of the Indiana Rules of Evidence and the Indiana Administrative Orders and Procedures Act (AOPA). AOPA specifically states in IC § 4-21.5-3-27(d) that "findings must be based exclusively upon the evidence of record in the proceedings and on matters officially noticed in that proceedings. Findings must be based upon the kind of evidence that is substantial and reliable." Hearsay evidence is admissible but an order cannot be based solely upon the hearsay evidence. IC § 4-21.5-3-26.

evidence of submitting false information. The Petitioner and his family explained why they checked certain boxes and provided information at the time the form was submitted. Additionally, even a Penn school official, Jeff Hart, admitted he had difficulty determining the best way to complete the forms based on the unique situation the family was placed in. The decision of the IHSAA to rule there was a Rule 17-7.4 seems in line with the belief they should look at the worst in people versus the best. The parents completed a form they were not familiar with. That combined with the lack of intimate knowledge of the IHSAA Bylaws, is not submitting false information. The Petitioner and his family acknowledged they were trying to provide the information they thought was necessary.

10. The Panel understands the necessity for Rule 19 and the need for a bonafide change of residence, but not all families will abandon a residence and move the entire family at once to a new home. The Review Committee found the move to a healthier environment was “not only farfetched, by outrageously irrational and that moving closer to a grandfather is “ludicrous.” Families make all kinds of decisions that are in the best interest of their families and particularly for their children. The Petitioner moved to a school that is not a football powerhouse. If he wanted to make a purely athletic decision, it would have made more sense to stay at Walnut Hills where he was guaranteed a starting position or the Alabama school that guaranteed him a spot. Prior to transferring to Penn, he had no idea if he would be afforded a starting position on the football team or any position at all. Additionally, Rule 19 is meant to prevent recruiting and undue influence and there is a lack of any evidence Penn engaged in any such conduct. The Panel also continues to be disappointed the Review Committee minimizes the impact of bullying or what they referred to as a “name calling incident”. Bullying impacts students, even big strong football players. Words and actions of peers can have a profound impact on a child. The Panel finds the Petitioner had a bonafide corresponding change of address to a new district. The Panel finds the specific unique circumstances and facts in this case warrant such a conclusion.

11. The Panel finds the Petitioner has a hardship condition that meets the conditions of Rule 17-8.1. The Petitioner wanted to find a school that would provide in-person instruction and a healthier environment free of bullying and harassment. The IHSAA rules will not be diminished giving this student athletic eligibility. There is undisputed evidence that the Petitioner was bullied by his peers and Walnut Hills staff. The Petitioner’s family reported it to school officials. The Review Committee’s solution of just deleting a social media account would somehow end the bullying situation fails to acknowledge it is not incumbent upon students to stop the bullying, instead it is the responsibility of the grown-ups and school officials to ensure he is supported and protected from continued bullying, harassment and name-calling. This is particularly true during the middle of a pandemic that is profoundly impacting the mental health of students.

ORDER

The Panel finds by a vote of 4-1 that the decision of the IHSAA Review Committee, upholding the decision of the Commissioner is NULLIFIED. The Petitioner has full eligibility as of September 29, 2020 at the receiving school, provided he meets all other eligibility requirements.

DATE: 10/1/2020



Kelly Wittman, Chairperson
Case Review Panel

APPEAL RIGHT

Any party aggrieved by the decision of the Case Review Panel has forty-five days from receipt of their written decision to seek judicial review in a civil court with jurisdiction, as provided by Ind. Code § 20-26-14-7.