

**BEFORE THE  
CASE REVIEW PANEL**

In The Matter of Miguel Berdiel,	)	
Petitioner	)	
and	)	<b>CAUSE NO. 010201-10</b>
The Indiana High School Athletic Assoc., Inc.,	)	
Respondent	)	
	)	
Review Conducted Pursuant to	)	
I.C. 20-5-63 <i>et seq.</i>	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

**Procedural History**

Petitioner is a seventeen-year-old (d/o/b December 24, 1983) senior presently enrolled in Andrean High School, a nonpublic school located in Lake County, Indiana (hereafter, “Andrean”). Petitioner is also a native of Puerto Rico. He arrived in Indiana on August 20, 2000, ostensibly as a foreign exchange student.<sup>1</sup> Petitioner attended a private school in Puerto Rico for his freshman and sophomore years. He is presently 6' 6" tall and is, by all accounts, considered a viable prospect to play basketball at the collegiate level. He participated in basketball in Puerto Rico at both the school and club levels. He was also named to the Puerto Rican “under-21” basketball team, where he started as the point guard. Prior to his junior year, it was arranged for him to attend a nonpublic school in Maryland that has a national reputation as a basketball powerhouse. Petitioner stated that motivating factors for enrolling in the private school were to improve his English and academic prowess. He did not enroll as a foreign exchange student. Petitioner lived with an assistant coach. The private school reportedly has a bevy of talented basketball players who are recruited to attend this institution. The basketball team travels widely, including Hawai’i. The school has a contract with a well known manufacturer of sporting goods and apparel, which provides the team with basketball shoes and uniforms. Petitioner became disenchanted with the private school’s over-emphasis on sports, the coaches requiring him to play and perform while injured, and the school reversing its earlier statements

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<sup>1</sup>As will be noted *infra*, this status as a foreign exchange student is confusing. Natives of Puerto Rico have U.S. citizenship by federal law. See 8 U.S.C. §1402. As such, Petitioner could not be a “foreign exchange student.”

that he would not have to assist with a summer basketball camp. In addition, his mother began to experience health problems. Petitioner left the Maryland school and returned to Puerto Rico on or about May 18, 2000. He completed his sophomore year in a Puerto Rican school.

A friend of Petitioner's family assisted Petitioner in enrolling in Andean. The friend was acquainted with a person in Schererville, which is located in Lake County. Petitioner, who is Roman Catholic, was interested in attending school in the United States for the reasons stated previously, but following his Maryland experience, he wished to be enrolled in a nonpublic school of his faith tradition. Andean is the closest Roman Catholic school to Schererville.

Petitioner applied for a foreign exchange student program under the American International Youth Student Exchange Program, a program that is on the list of approved programs under the standards of the Council on Standards for International Educational Travel (CSIET). Respondent relies upon the standard-setting practices of the CSIET when reviewing athletic transfers involving foreign exchange students. See **Rule C-19-7.1(d)**.<sup>2</sup> Petitioner was accepted into the program. A host family was eventually secured for Petitioner.<sup>3</sup> Andean, a member school of Respondent's organization, submitted an "IHSAA Athletic Transfer Report," as required by **Rule C-19-8.1**.<sup>4</sup> The principal at Andean and

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<sup>2</sup>The IHSAA has promulgated a series of by-laws as a part of its sanctioning procedures for interscholastic athletic competition. Some by-laws apply to specific genders ("B" for Boys; "G" for Girls), but most of the by-laws are "common" to all potential athletes and, hence, begin with "C." **Rule 19**, which governs transfers and eligibility, is common to all athletes." **Rule C-19-7** addresses specifically the eligibility of a foreign exchange student. In order to qualify for eligibility at the varsity level, a foreign exchange student must, in part, not have completed the secondary education program in the student's home country, meet all IHSAA eligibility rules (including scholarship and age rules, neither involved in this matter), and the foreign exchange program must be approved both by the IHSAA and the Council on Standards for International Educational Travel (CSIET). The IHSAA requires that foreign exchange programs, to be approved, must, *inter alia*, be under the auspices of an established national entity, assign students in such a fashion as to insure that the placement was not the result of undue influence to attend a particular school for athletic reasons (often referred to as "random" placement selection), and consult with the principal of the IHSAA-member school prior to placement. All references herein are to the IHSAA's By-Laws for the 2000-2001 school year.

<sup>3</sup>Official letters from the foreign exchange program are dated in mid-August of 2000, which seems to indicate a relatively short time frame between acceptance and placement. The Petitioner and the host family were actually notified much earlier of acceptance into the program.

<sup>4</sup> The Respondent has developed various forms for reporting information regarding transfers. It has been reported that Respondent reviews over 3,000 transfers every school year. There are different forms for different reasons. The IHSAA Athletic Transfer Report submitted for Petitioner is the standard reporting form for any student. There is a separate form for foreign exchange students

the principal at the last Puerto Rican school Petitioner attended both represented that Petitioner's transfer was in his best interest and was not athletically motivated. These attestations by the respective principals are part of the consideration of "hardship" under **Rule C-17-8.5** where a student has transferred but without a corresponding change of residence by the student's parents. It is not contested in this case that Petitioner's parents have not changed their residence during all relevant times herein.

Originally, an IHSAA Application for Foreign Exchange Student Eligibility Request form was completed and filed with Respondent on or about August 23, 2000. The typical IHSAA Athletic Transfer Report was completed and filed later, albeit in stages due to the necessity to verify information from Puerto Rico. Respondent, through its Commissioner, reviewed the information and, by letter of November 28, 2000, requested additional information from Andrean, especially with respect to the representation as a foreign exchange student and whether he had a visa.<sup>5</sup>

Andrean, in its response of December 7, 2000, acknowledged that Petitioner does not have a visa nor does he require one because citizens of Puerto Rico are also U.S. citizens. However, Andrean argues that the citizenship status of Puerto Ricans, including Petitioner, is a statutory right and not a constitutional one. Andrean reiterated arguments in its earlier letter of November 17, 2000, that Petitioner specifically and Puerto Ricans generally should be considered "foreign" for the purpose of classifying foreign exchange programs because Puerto Ricans cannot vote for president, do not pay federal taxes, and lack voting representation in Congress.<sup>6</sup>

Respondent also sought clarification from CSIET. On November 21, 2000, CSIET responded that high school students from Puerto Rico would not be eligible for visas because they are already U.S. citizens.

On December 14, 2000, Respondent's Commissioner denied full eligibility to Petitioner but did grant him "limited eligibility."<sup>7</sup> Petitioner timely appealed the Commissioner's determination to the

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(Application for Foreign Exchange Student Eligibility Request).

<sup>5</sup>Respondent's by-laws define a "foreign student" for the purposes of **Rule C-19-7** as a "student in a member school with any type of visa..."

<sup>6</sup>This is not peculiar to residents of Puerto Rico. It is also true of other American possessions or territories, such as the Virgin Islands (see 8 U.S.C. §1406) and Guam (8 U.S.C. §1407), and had been true of Hawai'i and Alaska prior to their admittance as states (8 U.S.C. §§1404, 1405).

<sup>7</sup>"Limited eligibility" is defined under **Rule 19** as meaning a student may participate in all interschool athletics, except on varsity athletic teams, for a period of 365 days from the date of last participation at the previous school. **Rule C-19-6.2**. In this situation, Petitioner would be eligible to participate in junior varsity basketball but not varsity basketball.

Respondent's Review Committee under **Rule C-17-4**. A hearing was conducted on January 11, 2001, with a written decision issued on January 16, 2001. The Review Committee upheld the determination by the Commissioner that Petitioner should be afforded "limited eligibility" and not "full eligibility." The Review Committee noted that Petitioner could not be a foreign exchange student because he is a U.S. citizen and does not require a visa. Assuming Petitioner were a foreign exchange student, however, he still would not qualify for full eligibility because the method of placement violated Respondent's by-laws. It also noted that Petitioner did not establish any of the criteria for invoking the "Hardship Rule."<sup>8</sup>

### **APPEAL TO THE CASE REVIEW PANEL**

Petitioner sought review of the Respondent's final decision by initiating the instant action before the Case Review Panel (CRP), created by P.L. 15-2000, adding I.C. 20-5-63 *et seq.* to the Indiana Code. The CRP is a nine-member adjudicatory body appointed by the Indiana State Superintendent of Public Instruction. The State Superintendent or her designee serves as the chair. The CRP is a public entity and not a private one. Its function is to review final student-eligibility decisions of the IHSAA, when a student, parent or guardian so requests. Its decisions are to be student-specific, applying only to the case before the CRP. The CRP's decision does not affect any By-Law of the IHSAA.

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<sup>8</sup>**Rule C-17-8** is the IHSAA's "Hardship Rule." Generally, the "Hardship Rule" allows the IHSAA "to set aside the effect of any Rule [with some exceptions] when the affected party establishes, to the reasonable satisfaction of [the IHSAA], all of the following conditions are met:

- a. Strict enforcement of the Rule in the particular case will not serve to accomplish the purpose of the Rule;
- b. The spirit of the Rule has not been violated; and
- c. There exists in the particular case circumstances showing an undue hardship that would result from enforcement of the Rule." **Rule C-17-8.1.**

The IHSAA, on its own initiative, can invoke the "Hardship Rule," but a member school cannot. **Rule C-17-8.2.** The IHSAA provides some guidance and examples as to what would be considered a "hardship." See **Rule C-17-8.4** (e.g., injury, illness or accidents that result in a student being unable to meet a basic requirement; substantial changes in the financial condition of the student or his family, although these would have to be permanent and "significantly beyond the control of the student or the student's family") and **Rule C-17-8.5**, which applies directly to **Rule 19** (the "Transfer Rule"), specifically **Rule C-19-6**, which allows the IHSAA to grant full eligibility where (a) the student establishes "the transfer is in the best interest of the student and there are no athletic related motives surrounding the transfer," and (b) the principals of the sending and receiving schools affirm in writing that the transfer is in the best interests of the student and there are no athletic-related motives.

Petitioner initiated this review through a facsimile transmission received on February 1, 2001, by the Indiana Department of Education on behalf of the CRP. Both Petitioner and the Respondent were advised on that date of their respective hearing rights. Petitioner was presented with forms to permit or deny the disclosure of student-specific information that, in effect, would make the review hearing by the CRP open to the public. Petitioner elected to have the hearing open to the public.

The parties were advised thereafter of the date, time, and place for the conduct of the review hearing. The review hearing was set for February 12, 2001, at the First Floor Conference Room, 251 E. Ohio St. Notice of the review hearing was posted, as required of public agencies by Indiana's Open Door Law, I.C. 5-14-1.5 *et seq.* CRP members were provided with copies of the record as established before the IHSAA. Petitioner appeared in person and by counsel. Respondent appeared by counsel and its Commissioner.

Based on the testimony at the hearing as well as the record before the Case Review Panel, the following Findings of Fact, Conclusions of Law, and Orders are determined.

#### FINDINGS OF FACT

1. Petitioner is a seventeen-year-old senior enrolled in Andean High School, a nonpublic school that is a member of the Indiana High School Athletic Association, the Respondent herein. Petitioner is a native of Puerto Rico and a U.S. citizen. He does not require a visa to travel in the United States.
2. Petitioner attended a nonpublic school in Maryland during most of his junior year. The nonpublic school is noted for its basketball team, travels extensively, and has endorsement contracts. Petitioner, who is 6' 6" tall and is a member of Puerto Rico's "under-21" national team, attended the Maryland school to improve his facility with the English language and to improve his academics. His experience at the Maryland school, however, was disappointing. The coaches required him to play even when injured, the school reneged on its representation to Petitioner that he would not have to assist with a summer basketball camp, and the school seemed more interested in basketball than in academics. In addition, Petitioner's mother experienced some health problems. In May of 2000, Petitioner returned to Puerto Rico and completed his junior year in a Puerto Rican school.
3. Through a friend of the family, it was arranged for Petitioner to travel to Lake County, Indiana, where a nonpublic school of Petitioner's faith tradition would be located. This was a site-to-site arrangement. Petitioner enrolled in Andean High School and is responsible for the tuition. Petitioner's stated reasons for attending Andean are the same as he gave for attending the Maryland school: to improve his facility with English and to improve his academic standing. Prior to Petitioner's arrival in Lake County and Andean, he applied to a foreign exchange student program and was accepted, notwithstanding the fact that he is a U.S. citizen. The

foreign exchange program is on the approved list of organizations maintained by CSIET and relied upon by the IHSAA.

4. Respondent denied full eligibility to Petitioner, but did provide him with “limited eligibility,” which would allow him to play on the junior varsity team but not the varsity team. Respondent determined that Petitioner did not meet any of the criteria in **Rule C-19-6.1** that would have enabled him to have full eligibility. Specifically, Petitioner did not transfer with a corresponding change of residence by Petitioner’s parents.<sup>9</sup> Petitioner maintains that he does meet the requirements of **Rule C-19-6.1(m)**, which states a student will have immediate full eligibility if “The student is a qualified foreign exchange student under Rule 19-7 who has attended a member school for less than one year.”
5. Respondent’s **Rule C-19-7.1** defines “foreign student” in part as a “student in a member school with any type visa...”
6. Respondent determined that Petitioner was not a “qualified foreign student” because he did not have a visa. However, Respondent determined that Petitioner would not qualify for full eligibility even if he were a “qualified foreign exchange student” because his placement at Andean was not the result of a “random selection process.” Petitioner objects to the use of this qualifier, asserting that the term “random” does not appear in **Rule C-19**.
7. Although the term “random selection process” does not appear in **Rule C-19-7**, the rule does require that foreign exchange programs, to be approved by the Respondent, “must assign students to schools by a method which insures that no student, school or other interested party may influence the assignment for athletic purposes [.]” **Rule C-19-7.1(d)(2)**.

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<sup>9</sup>**Rule C-19-6.1** contains thirteen (13) exceptions to the general rule that a student will not have full eligibility if the transfer is not accompanied by a change of residence by the student’s parent or guardian. This includes, *inter alia*, such instances where the transfer is due to wardship or guardianship created by a court; the move is necessitated by divorce or separation of the parents; the student’s former school closed; the student’s former school is not accredited in the state where the school is located; the transfer was due to redistricting by the local school board; the student enrolled in one school in error and transferred promptly when the error was discovered; the student transferred from a correctional school; the student is emancipated; the student did not participate in interschool athletic contests as a representative of another school during the preceding 365 days; the student transferred to a member school from a non-member school; the student transferred to a member school that is also a boarding school; and the student is a qualified foreign exchange student under **Rule C-17**. There are internal qualifications for the criteria stated above. These are general statements of the criteria of this rule.

## CONCLUSIONS OF LAW

1. Although the IHSAA, the Respondent herein, 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 is “state action” and for this purpose makes the IHSAA analogous to a quasi-governmental entity. IHSAA v. Carlberg, 694 N.E.2d 222 (Ind. 1997), *reh. den.* (Ind. 1998). The Case Review Panel has been created by the Indiana General Assembly to review final student eligibility decisions with respect to interscholastic athletic competition. P.L. 15-2000, adding I.C. 20-5-63 *et seq.* to the Indiana Code. The Case Review Panel has jurisdiction when a parent, guardian, or eligible student invokes the review function of the Case Review Panel. In the instant matter, the IHSAA has rendered a final determination of student-eligibility adverse to the student. The student has timely sought review. The Case Review Panel has jurisdiction to review and determine this matter.
2. 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.
3. Notwithstanding the acknowledged differences between residents of Puerto Rico and residents of mainland United States, it is still a legal fact that Petitioner is a U.S. citizen.
4. Petitioner does not meet the definition of a “qualified foreign exchange student” under **Rule C-19-7** because he is not attending a member school pursuant to a visa.
5. Notwithstanding Conclusion of Law No. 4, even if Petitioner were considered a “qualified foreign exchange student” for the purposes of applying Respondent’s by-laws, his placement in Lake County was site-to-site and not pursuant to a selection and placement method that would ensure or diminish the possibility that such a placement was secured for athletic purposes. Respondent’s characterization of this provision as a “random selection process” is an accurate characterization of the import of this language at **Rule C-19-7.1(d)(2)**.
6. Although Petitioner offered little if any testimony regarding the “Hardship Rule” criteria at the hearing before the CRP, it is assumed from the record as a whole that Petitioner intends for the criteria to be applied. In the absence of any further testimony or documentary evidence supplied by Petitioner, there is no reason to disturb Respondent’s determination that Petitioner failed to satisfy the criteria for applying Respondent’s “Hardship Rule.”
7. Petitioner alleges without any evidentiary foundation that Respondent’s by-laws discriminate against residents of Puerto Rico. Petitioner had the opportunity to present evidence and testimony, as well as to cross examine Respondent’s Commissioner, regarding any facts that could support such a conclusion. None was forthcoming. Respondent denied Petitioner “full eligibility” because he transferred schools without a corresponding change of residence by his

parents. There is no showing that Petitioner was or has been treated any differently from similarly situated student-athletes who may transfer to Indiana member schools from other states, territories, or insular possessions. To the extent the CRP can address such an issue, there is no evidence that Respondent has discriminated against Petitioner.

ORDER

The decision of the Indiana High School Athletic Association to deny Petitioner full eligibility but to grant him limited eligibility is upheld. The vote of the Case Review Panel in this regard was 7-0.

DATE: February 19, 2001

/s/ John Earnest, Chair  
Case Review Panel

APPEAL RIGHT

Any party aggrieved by the decision of the Case Review Panel has thirty (30) calendar days from receipt of this written decision to seek judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.