

**BEFORE THE INDIANA
CASE REVIEW PANEL**

In The Matter of K.M.,)	
Petitioner)	
and)	CAUSE NO. 080108-56
The Indiana High School Athletic Assoc. (IHSAA),)	
Respondent)	
)	
Review Conducted Pursuant to)	Closed Hearing
I.C. 20-5-63 <i>et seq.</i>)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

K.M. (hereafter, “Petitioner”) is presently a 20 year old senior at Howe Academy (hereafter “Howe”), a public school located in Indianapolis, Indiana. He was born on October 10, 1987. He attended Arsenal Technical High School (hereafter “Tech”) for his freshman year (2004-2005). He transferred to Howe during the spring of his sophomore year (2005-2006). During his freshman and sophomore years, Petitioner played on the Tech varsity basketball team. At Howe, Petitioner was given limited athletic eligibility. He initially played on the JV squad but upon obtaining full eligibility at the end of the 2007 season Petitioner played on the varsity team during the 2007 boys state basketball tournament.

Petitioner acknowledges that he has reached the age of twenty prior to the scheduled date for the boys state finals in basketball. Strict application of Respondent’s **Rule C-4-1** (“Age Rule”)¹ makes him ineligible for continued participation in high school athletics. Petitioner believes that his circumstances should be considered and Respondent’s **Rule C-17-8.1** (“Hardship Rule”)²

¹The 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 many of the by-laws are “common” to all potential athletes and, hence, begin with “C.” **Rule C-4-1** provides as follows:

A student who is or shall be twenty (20) years of age prior to or on the scheduled date of the IHSAA state finals in a sport shall be ineligible for interschool athletic competition in that sport; a student who is nineteen (19) years of age on the scheduled date of the IHSAA state finals in a sport shall be eligible as to age for interschool athletic competition in that sport. (All references are to the 2007-2008 by-laws.)

²**Rule C-17-8.1** The Hardship Rule allows the IHSAA to set aside the effect of any rule [with some exceptions] when the affected party establishes to the satisfaction of [the IHSAA], all of the following conditions have been 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.

However, The Hardship Rule does not apply to “Rules 4 [Age], 12 [Enrollment and Attendance] and 18 [Scholarship].”

should be applied. However, Respondent's By-Laws prohibit the application of the "Hardship Rule" to the "Age Rule". See **Rule C-17-8.1**.

On October 5, 2007 Petitioner, by counsel, filed a request for a waiver of **Rule C-4-1** with Respondent's Commissioner. The Commissioner responded on October 11, 2007, denying the request for the waiver, adding that even if he were inclined to grant the waiver, this is a Rule that he is not authorized to waive. On November 13, 2007 Petitioner, by counsel, filed a request for reconsideration by the Commissioner. In his request Petitioner noted that he was identified with a learning disability and that he was seeking a hardship or an exception to the age rule on that basis. The Commissioner responded on November 16, 2007, again denying the request for an exception to the age rule and a hardship eligibility determination. Petitioner, by a letter dated November 26, 2007, sought review of the Commissioner's decision by Respondent's Review Committee, as provided by Respondent's **Rule C-17-4**.³ The Commissioner notified Petitioner's counsel by letter dated November 26, 2007, that the Review Committee would meet to discuss this matter on December 13, 2007. Respondent's Review Committee met on December 13, 2007. It issued its decision on December 27, 2007, affirming the decision of the Commissioner.

APPEAL TO THE CASE REVIEW PANEL

Petitioner, by counsel, appealed the adverse decision of the Review Committee to the Indiana Case Review Panel (CRP) on January 8, 2008.⁴ The CRP notified the parties by memorandum of January 9, 2008, of their respective hearing rights. The Respondent was asked to forward its record. Petitioner's counsel was provided with a "Consent to Disclose Student Information." Petitioner elected to have the hearing proceedings **closed** to the public. A hearing was set for January 29, 2008, in the offices of the Indiana Department of Education.

On January 29, 2008, the CRP convened.⁵ Both parties were represented by counsel. Respondent submitted one (1) exhibit, which was marked R-1. This exhibit was a video containing excerpts of Petitioner playing basketball in a game from last season. Petitioner did not object to this exhibit; however, Petitioner's counsel noted that the exhibit was not representative of Petitioner's play during the entire game. The exhibit was entered into the record.

³Rule C-17-4.1 states: Any affected party may appeal a decision of the Commissioner or his designee to the Review Committee for a review and hearing. The Review Committee is the initial review panel of all Association decisions and must consider all Association decisions prior to any review either by the case review panel described at Rule 17-10 or by any other body.

⁴The 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 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.

⁵Five members were present: Joan Keller (Chair), Melissa Starry, Stephen Sipes, Scott Eales, Christi Bastnagel.

The following Findings of Fact and Conclusions of Law are based upon the evidence and testimony presented at the hearing in this matter, as well as the record as a whole. All Findings of Fact are based upon evidence presented that is substantial and reliable. I.C. 4-21.5-3-27(d).

FINDINGS OF FACT

1. Petitioner is a 20 year old senior (d/o/b October 10, 1987) at Howe. The evidence presented during the hearing regarding Petitioner's height and weight indicated that Petitioner is within a range of 6'2 and 170 lbs. to 6'3 and 185 lbs.
2. Petitioner's social history indicates that he did not have early developmental delays. Petitioner attended Indianapolis Public School ("IPS") # 26 for grades Kindergarten through 2. In the first grade Petitioner earned the following grades: 3 A's, 2 C's, 3 D's and 3 F's. Petitioner failed the first grade and repeated that year at IPS #26. No evidence was presented that indicated that Petitioner failed the first grade for any reason other than poor grades.
3. Petitioner attended IPS #74 for grades 3 through 6. In the 5th grade a teacher suspected that Petitioner was suffering with ADHD and it was recommended that he go to Midtown Mental Health for additional testing and services. Petitioner did go to Midtown for the testing but he did not receive any additional treatment or services.
4. Petitioner attended Harshman Middle School for grades 7 and 8. Petitioner failed the seventh grade. It is unclear as to why Petitioner had to repeat the seventh grade. He received a failing grade in only one class that year. Petitioner testified that the decision to hold him back was made by his math teacher. No additional evidence was presented indicating why Petitioner repeated the seventh grade.
5. Petitioner entered Tech High School as a sixteen year old freshman. He attended Tech for his freshman year (2004-2005) and continued at Tech until the spring of his sophomore year (2005-2006). In the fall of Petitioner's sophomore year it was noted that Petitioner was failing classes and having difficulty in school. It was recommended that he receive testing to help identify the problem. Petitioner underwent a battery of testing in late November and early December of 2005. In the spring of Petitioner's sophomore year he transferred to Howe.
6. Although Petitioner struggled academically throughout his elementary and middle school years Petitioner was not referred for an educational evaluation to determine whether he required special education and related services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. Part 300, as implemented in Indiana through 511 IAC 7-17 *et seq.* ("Article 7")⁶ until his junior year at Howe.

⁶The Article 7 provisions require a referral for an educational evaluation, eligibility, identification, development of an Individualized Education Program (IEP) by a Case Conference Committee (CCC), and the establishment of an appropriate educational placement in the "least restrictive environment" (LRE).

7. Petitioner's educational evaluation was completed on November 7, 2006. The evaluation revealed that Petitioner has a learning disability⁷. The CCC determined that Petitioner was eligible for services under Article 7. His accommodations included time in the resource room and extra time on tests.
8. Petitioner has played basketball since the third grade. He didn't play organized basketball until the sixth grade. Petitioner is average to above-average in athletic ability. As a freshman and sophomore he played on the Tech varsity basketball team. As a sophomore Petitioner was selected to the Indianapolis All-City Team, which is comprised of some of the best basketball players in the city of Indianapolis.
9. Petitioner lived with his mother in the Tech school district until he was emancipated.⁸ He subsequently moved to a residence located in the Howe school district. Petitioner testified that he moved in with his cousin because his mother pressured him to quit school and get a job, or join the military.
10. At Howe, Petitioner was initially granted limited eligibility and was only able to play on the JV squad. However, by the end of the 2006-2007 season, Petitioner had obtained full eligibility and was able to play on the varsity squad during the boys state basketball tournament. Howe played in three (3) games in the tournament, including two (2) sectional games, which Howe won, and one (1) regional game. Petitioner started in two of the games.
11. Petitioner has a 1.627 G.P.A. and will receive a certificate of completion at the end of the school year. He has not taken the ACT or SAT. He hopes to attend a junior college.
12. Petitioner's coach, who is also a special education teacher at Howe, testified that Petitioner's size and weight doesn't present much of a threat to the other students. He described Petitioner as being an OK player, not an exceptional one. His biggest concern is that Petitioner was not identified earlier as a student with a learning disability and therefore did not properly receive the support services he needed to succeed. He doesn't believe that Petitioner's age and size give him a competitive advantage.
13. Respondent stated the Age Rule is one of its "fundamental rules," which makes waiver unwarranted. Some student-athletes at the high school level are only 14 years of age. A 14-year-old student-athlete is at a physical disadvantage compared to a 20-year-old student-athlete. This poses a health and safety risk. The Age Rule ensures that adults are not competing against adolescents. Respondent also asserts that there is a "displacement" issue. Adult students—*i.e.*, those who do not meet the Age Rule requirements—displace students on the roster who are age-appropriate for high school. Respondent also represents the Age Rule prevents "red shirting," a practice where students are retained in earlier grades in order to obtain an athletic advantage when they are older.

⁷See 511 IAC 7-26-8 for the eligibility criteria for "learning disability."

⁸See IC 20-26-11-4 for the definition of emancipated.

14. Respondent testified that “redshirting” was not an issue in this case; however, Respondent believes the displacement issue is still relevant to this case. Respondent further acknowledged that it has no mechanism to waive the Age Rule.

CONCLUSIONS OF LAW

1. 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 “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. I.C. 20-5-63 *et seq.* The Case Review Panel has jurisdiction when a parent or guardian invokes the review function of the Case Review Panel to challenge an application or interpretation by Respondent of one of its by-laws. In the instant matter, the IHSAA has rendered a final determination of student-eligibility adverse to the Student. The Petitioner timely sought review. The Case Review Panel has jurisdiction to review and determine this matter. The Case Review Panel is not limited by any by-law of Respondent. The Case Review Panel is authorized by statute to either uphold, modify, or nullify the Respondent’s adverse eligibility determination.
2. Petitioner asserts that he is entitled to certain protections or considerations under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. Part 300, as implemented in Indiana through 511 IAC 7-17 *et seq.* (“Article 7”). Petitioner was diagnosed with a learning disability on November 7, 2006. Prior to that date he received no Article 7 services. He concludes that this failure to provide those support services resulted in him being held back twice in elementary school. Therefore, Respondent’s strict interpretation and application of **Rule C-4-1** (Age Rule) and **Rule C-17-8.1** (Hardship Rule) operate to deny Petitioner a Free and Appropriate Public Education (“FAPE”).⁹
3. The CRP does not have jurisdiction to determine whether Respondent has denied Petitioner a FAPE.. Clearly, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. Part 300, as implemented in Indiana through 511 IAC 7-17 *et seq.* (“Article 7”) has some effect on Respondent’s By-Laws. However, this is a law regarding the provision of special education and related services to students with disabilities. This is not a civil rights law, nor does it include all students with disabilities. The principal federal non-discrimination laws affecting students with disabilities who are enrolled in public schools are Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as implemented by 34 CFR Part 104, and the Americans with Disabilities Act of 1990,

⁹Congress sought to remedy the inequality of disabled children being denied the educational opportunities enjoyed by their nondisabled peers by providing supplemental federal funds to states which fulfill the requirements of IDEA, foremost among which is the provision to each disabled individual a free appropriate public education in the least restrictive environment. *31 Ind. L. Rev. 1167 (1998)*

Title II of same, 42 U.S.C. § 12101 *et seq.* and in this instance neither requires Respondent to waive the age rule as a reasonable accommodation.

4. In a factually similar case, Sandison v. Michigan High School Athletic Ass'n. Inc., 64 F. 3d 1026 (6th Cir. 1995), the 6th Circuit Court of Appeals rejected the claims of students who had been retained earlier in their school careers for unspecified learning disabilities and were subsequently unable to compete in interscholastic sports because of Michigan's age rule. Plaintiffs asserted that the Age Rule resulted in a present discriminatory effect. The Court rejected that claim and found that the age restriction was applied to all students, with or without disabilities, and the requirements of Sec. 504 and the ADA were to ensure equal opportunities to participate in athletics.

5. The Office for Civil Rights (OCR) of the U.S. Department of Education enforces all anti-discrimination laws where a recipient of federal education funds is involved. This includes Sec. 504 and the ADA. The OCR has indicated that "age rules" are based upon physiological principles and are not discriminatory *per se*.¹⁰ Respondent's Review Committee stated the "purposes and goals of the Age Rule" in its ruling:
 - (i) establishing a uniform, bright-line rule for all IHSAA member schools and their students to follow;
 - (ii) discouraging the practice of red-shirting, the exploitation of student athletes and the repeating of grades of high school as a subterfuge for otherwise improper athletic-motivated conduct;
 - (iii) having the maximum number of team positions available and creating interschool athletic opportunities for younger student athletes who are of the customary age of students in high school;
 - (iv) Promoting competitive equality among member schools by limiting the possibility that a team will gain an unfair competitive advantage over opponents by having older student athletes, who may be physically larger, more mature, experienced and skilled; and
 - (v) promoting the health and safety of student athletes of customary high school age, especially in those sports involving contact and those student athletes who are just beginning high school and are substantially younger and less experienced.Respondent added: "The Age Rule limits the participation in high school athletics to participants who are 14 to 19, and customarily of high school age." (*Review Committee's Finding No. 6.*)

Respondent's rule does not employ suspect criteria that targets any identifiable group. It bears a rational relationship to a legitimate interest.

6. Respondent's Age Rule is a facially neutral rule adopted for a neutral purpose and applied on a neutral basis. Petitioner asserts that Respondent's neutral analysis is incorrect when a student has a disability. The value in a bright-line, uniform rule is advantageous in many respects but the ADA requires a more individualized approach. The CRP is guided in relevant part by the decision in Washington v. IHSAA, 181 F.3d 840 (7th Cir. 1999), *cert. den.* 528 U.S. 1046, 120 S. Ct. 579 (1999), a dispute also involving a student with a

¹⁰See California Department of Education, Education of the Handicapped Law Reporter (EHLR) at 257:239 (OCR 1981); Maine Department of Educational and Cultural Services, EHLR at 258:31 (OCR 1985)

learning disability. In order for Petitioner to be considered under the ADA, he must have a disability, be “otherwise qualified” to participate in basketball and demonstrate that his exclusion from playing basketball is by virtue of his disability. 181 F.3d at 843. The 7th Circuit indicated that, once this threshold is crossed, there is a two-part legal inquiry: (1) Is the rule, without reference to any individual, “generally fundamental and essential”; and (2) Would the individual waiver of the rule be a “reasonable modification because there would be no conflict with the purposes behind the ... rule.” *Id.* at 843-44.¹¹

7. The 7th Circuit noted in Washington that an individualized approach “is consistent with the protections intended by the ADA.... To require a focus on the general purposes behind a rule without considering the effect an exception for a disabled individual would have on those purposes would negate the reason for requiring reasonable exceptions.” 181 F.3d at 851. The Respondent’s limitation of the Hardship Rule so that it does not apply to the Age Rule does not restrict the CRP from reviewing the matter in consideration of the Petitioner.
8. There is no evidence of red-shirting¹² in this case, nor is there any evidence that being retained in the first and seventh grade was a subterfuge for otherwise improper athletic-motivated conduct. “Displacement,” even if a consideration, was not proven by Respondent. Respondent addressed the issue only in a theoretical sense. Petitioner offered testimony that indicated that he would not “displace” anyone on the varsity squad. There were 4 freshman on the varsity squad and most of those players were needed for the JV squad since the number of younger players vying for positions on that team was relatively small.
9. Petitioner, however, has failed to establish that he is “otherwise qualified” under the ADA and that his ineligibility is due to an unfair application of the Age Rule. Petitioner was not identified as having a learning disability until his junior year of high school. Prior to that time he played varsity level basketball. No evidence was presented that indicated that he had an accommodation that allowed him to play varsity level sports. Petitioner alludes to the existence of a disability dating back to when he started kindergarten but Petitioner’s evidence did not clearly establish a nexus between a latent learning disability diagnosis and his earlier academic failures.
10. There is evidence of an unfair competitive advantage. Petitioner is a physically imposing, if not a dominating, player. He is more mature, experienced and skilled. He has been participating in varsity level sports since his freshman year. No evidence was presented to show that Petitioner’s participation would pose a health or safety risk to any other student-athlete. However, basketball is a sport with a lot of physical contact so it is disingenuous

¹¹The Age Rule was not involved in the Washington case. Rather, it was a challenge to the Eight-Semester Rule, **Rule C-12-2**, which presently reads: “After enrollment in the 9th grade for 15 or more school days, students shall be eligible for no more than four (4) consecutive years, or the equivalent (*e.g.*, 12 semesters in a tri-semester plan, *etc.*.)”

¹²The 7th Circuit defined “red-shirting” as “the practice of slowing a student’s academic pace and postponing his initial participation in competitive athletics in order to permit him to gain physical and athletic maturity before beginning his period of eligibility for competitive athletics.” Washington, 181 F.3d at 842, *n.* 2.

to argue that there is no health or safety risk. These factors negate Petitioner's hardship argument. Respondent can waive the effect of any eligibility rule where strict enforcement of the rule in a particular case would not serve to accomplish the purpose of the rule; the spirit of the rule would not be violated; and there exists in a particular case circumstances showing an undue hardship would result from enforcement of the rule. The evidence does not support a waiver in this instance. Petitioner is one of the better players on the team, and if he were eligible, he would likely displace a younger student on the team. The restriction imposed on Petitioner by virtue of his age is not the result of any exceptional circumstance that would warrant a waiver of the Age Rule.

11. Petitioner has no professional prospects or post-secondary scholarship offers that are jeopardized by his ineligibility. Petitioner's priority is to graduate from high school and attend a junior college. Petitioner is a twenty year old senior because of academic difficulties, not past discriminatory actions.

Based on the foregoing Findings of Fact and Conclusions of Law, and following discussion of the merits of the case on the record, the Case Review Panel decided as follows:

ORDER

1. The Respondent's decision to deny eligibility to Petitioner based on the application of the Age Rule is upheld. This decision was reached on a 5-0 vote.

DATE: February 21, 2008

/s/ Joan Keller, Chair
Indiana 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.