

CASCADE UNION HIGH SCHOOL)

NO. 2017-002

and)

OREGON SCHOOL)
ACTIVITIES ASSOCIATION)

OPINION

Nature of the Proceeding

This is a contested case proceeding conducted pursuant to Oregon School Activities Association (“OSAA”) Rule 9.2 in which the Cascade School District (“Cascade” or “the District”) challenges a decision of the OSAA Executive Board (“the Board”) that assigned the District to a “5A”¹ athletic conference, instead of to a “4A” conference to which Cascade asserts it should be assigned by virtue of its attendance and history.²

¹ Oregon high schools that wish to compete in interscholastic athletics are members of OSAA, which the member schools have mutually agreed will supervise athletic and other competitions in several ways. As pertinent here, each high school member of OSAA is assigned to one of six classifications—“1A” through “6A”—based on the school’s average daily membership (“ADM”), with the “6A” classification being reserved for the schools with the largest ADM.

² OSAA agrees that the present appeal is one that may be taken under OSAA rules. See, generally, OSAA Rule 9 (setting out the procedure to be followed in appeals).

The District's appeal was heard by the undersigned Hearings Officer on Wednesday, February 14, 2018, at the District's offices at 10226 Marion Rd. SE, Turner, Oregon. The hearing commenced at 9:00 a.m. and concluded at 12:30 p.m. on that date. The District was represented by its Superintendent, Daren Drill. OSAA was represented by Jon Radmacher, esq., Portland. Opening statements were made, witnesses were sworn, testimony and evidence (including a pre-hearing declaration) were heard, evidence was received, and closing arguments were made. After considering the record in its entirety and being fully advised, I enter the following Statement of Historical and Contextual Setting, Issues Presented, Findings of Fact, Conclusions of Law, and Order.

Historical and Contextual Setting

Cascade High School is a rural high school located outside the farming community of Turner, Oregon. The school also serves the nearby communities of Aumsville and Cloverdale. Historically, the school has been identified with a competitive athletic environment that most recently has included a 4A league with Stayton, North Marion, Philomath, Yamhill-Carlton, and Newport. However, the most recent Board decision setting classifications and districting for the 2018-2022 block of school years moved Cascade to a 5A league consisting of Central,

Corvallis, Crescent Valley, Dallas, Lebanon, North Salem,³ Silverton, South Albany, and West Albany. When so placed, Cascade became the school with the lowest average daily membership (“ADM”)—687—in the district, according to OSAA’s figures. Of the other nine schools in the district, only three had an ADM of less than one thousand and the largest—North Salem—had an ADM of 1389.

The Board’s movement of Cascade from a 4A to a 5A league was unexpected, but not surprisingly so. During the year-long process leading up to the Board’s decision, the Board’s Classification and Districting Committee (“CDC”), which was charged with recommending both the ADM intervals to be represented by each of the classifications and the membership of the individual schools in each of the districts within each classification (Article 9.2., OSAA Constitution). During its deliberations, the CDC circulated over eighteen different proposed classification and districting models for consideration and comment by the OSAA membership. The eighteenth proposal was circulated on June 23, 2017. Thereafter, on August 31, 2017, the CDC issued a nineteenth proposal, which it recommended for adoption, to the Board. That proposal placed Cascade in the 5A

³ North Salem, the largest school in the conference, has an average daily membership (“ADM”) that normally would have placed it in a 6A league, but it was assigned to the 5A league after requesting and being granted leave to “play down” to the smaller school classification.

district already described. The Board adopted that proposal at its meeting on October 16, 2017, with minor changes unrelated to this proceeding.

Of the various proposals issued by the CDC during its year-long effort, many proposed placing Cascade in a 4A district; the others placed it in a 5A district. In fact, the CDC's final proposal (the 19th), which placed Cascade in a 5A district, followed several proposals (the 16th, 17th, and 18th) that placed Cascade in a 4A district. Two facts were different in the 19th proposal from all those that had preceded it: Cascade's ADM was increased from "683" to "687," and the upper cutoff ADM for 4A schools was reduced from "690" to "664."

Following the CDC's submission of its final (19th) proposal as its recommendation to the Board, and the Board's adoption of it, Cascade filed the present appeal.

Issues Presented

In its appeal, Cascade presents two legal arguments:

Argument Number 1. Cascade's placement within the 5A group of schools is based on ADM figures from the Oregon Department of Education for the 2016-2017 school year. However, Cascade asserts that a correct reading of the OSAA Constitution and Rules demonstrates that the appropriate ADMs to be used for

comparative purposes were the 4A upper ADM cutoff number and Cascade's ADM *for the 2017-2018 school year* and, when so considered, Cascade is a 4A, not a 5A, school.

Argument Number 2. Cascade's placement within a 5A district creates a health hazard for its students, because all of the schools in the district are larger and some are so much larger that it is physically hazardous for Cascades's student-athletes, at least those involved in contact sports (and particularly football) to play against them. Thus, the assignment of Cascade to the 5A district violates Article 9.1.2.(d), OSAA Constitution.

I turn to a discussion of the parties' positions.

Argument Number 1.

Findings of Fact:

1. Classifications are reset, and schools are assigned to districts, on a quadrennial basis.
2. The four-year block that the Board assigned in its November, 2017, meeting was the block beginning with the 2018-19 school year and continuing through the 2021-2022 school year.

3. The criteria that the CDC is directed to consider in making its recommendations to the Board are set out in Article 9.2.1.(d)(1), OSAA Constitution, which provides in part:

“9.2.1. Charge. The Committee shall make recommendations to the Executive Board regarding classifications and districts for the upcoming four-year block. The duties and responsibilities of the Committee shall be:

“ * * * * *

“(d) To consider the following criteria, among any others they deem relevant, for recommending placement of schools in athletic districts:

“(1) The Committee must first consider and address the following four criteria before considering supplemental criteria:

“a) Safety of student participants and spectators, parents and other spectators, and school and other personnel;

“b) Minimizing loss of student instructional time;

“c) Minimizing the expenditure of school district and student and parent participant funds; [and]

“d) School enrollment data.

“(2) The Committee may also consider the following criteria, in addition to any others they deem relevant:

“a) School preference;

“b) Creation of similar sized leagues;

“c) Placement of schools within the same school district and classification in the same league;

“d) Scheduling problems;

“e) Athletic district history;

“f) Move as few schools as possible.

“* * * * *”

4. The reference to “school enrollment data” is a reference to ADM, with certain adjustments (when warranted by specified circumstances).

5. ADM is defined in Article 6.3, OSAA Constitution, which provides, in part:

“6.3 Computation of ADM. A school’s ADM for the purpose of classification shall include the school’s base number minus the school’s SES⁴ factor.

“6.3.1. Base Number. A school’s base number shall include the following:

“(a) Public high schools.

“(1) ADM for grades 9-12 reported by the Oregon Department of Education for the previous school year, plus

“(2) All students that participated for the school in the previous school year that did not attend the school (home school students, Associate Member school students, and students at private schools that do not offer an activity).

“* * * * *”

“6.3.2. SES Factor.

“A school’s socioeconomic (SES) factor shall be subtracted from a school’s base number to create an adjusted base number. The SES factor shall be determined by:

⁴ A school’s “SES factor” is a number that represents the likely lack of participation in the school’s various OSAA-regulated activities due to socioeconomic factors, including household size and income. Article 6.3.2., OSAA Constitution. There is no dispute in this case about Cascade’s SES factor.

“(a) Public schools. Using the school’s free lunch number as reported by the Oregon Department of Education, multiplied by 25%.

“* * * * *

(Emphasis added.)

6. In setting the parameters of the six competition classifications and in assigning schools to districts within each classification, OSAA utilized attendance figures compiled by the Oregon Department of Education (ODE).

7. The ODE figures that were used in the classification and districting process discussed here were from two different school years—year 2015-2016, and year 2016-2017.

8. From the beginning of the Classification and Districting Committee’s year-long effort, which had commenced in the fall of 2016, until late summer, 2017, the CDC used figures based on what each of its proposals described as “Adjusted 2015-2016 ADM.”

9. The cutoff point for eligibility to participate as a 4A school during the 2014-2018 block (the block that is about to expire) is 690.

10. Cascade’s “adjusted 2015-2016 ADM” during the 2014-2018 block is 683.

11. In June, 2017, ODE produced its final attendance figures for Oregon schools for the 2016-2017 school year. Thereafter, on August 31, 2017, the Committee issued its last classification and districting proposal (“proposal #19”), which constituted the Committee’s final recommendation to the Board. In contrast to the proposals that had preceded it, that proposal described its calculations as being based on what it referred to as the “Adjusted 2016-2017 ADM.”

12. Under the adjusted ADM figures, the CDC recommended, and the Board adopted, an upper limit for the 4A classification at 664 ADM.

13. Under the adjusted ADM figures, Cascade’s ADM was set at 687, *i.e.*, 23 over the 4A limit.

14. Because its new ADM was higher than the highest permissible 4A ADM, Cascade was placed in a 5A district.

15. The “Adjusted” figures first used in “proposal #19” served to set in stone the ADM for OSAA-governed schools, including Cascade, for the 2018-2022 four-year block.

Cascade argues that the use of its 2016-2017 ADM number by the Board was error, because the numbers used to calculate ADM begin with a base number, and OSAA used the wrong one with respect to Cascade. The applicable rule,

Cascade asserts (and OSAA does not disagree), is Article 6.3.1.(a), which is quoted *supra* but which I set forth again here for the convenience of the reader:

“6.3.1. Base Number. A school’s base number shall include the following:

“(a) Public high schools.

“(1) ADM for grades 9-12 reported by the Oregon Department of Education for the previous school year, plus

(2) All students that participated for the school *in the previous school year* that did not attend the school (home school students, Associate Member school students, and students at private schools that do not offer an activity).”

(Emphasis added.) The concept of a “previous year,” Cascade asserts, must—if “year” is to mean anything—encompass a *complete* year, and not skip between two years, as occurred during the CDC process in this case.

Linguistically, there is some basis for Cascade’s argument. As an adjective, “previous,” when standing alone, simply means “going before in time or order: prior.” *Webster’s Third New International Dictionary, Unabridged*, 2018.

However, when the adjective is coupled with the definite article, “the,” rather than the indefinite article, “a,” in a reference to a series of things or events (such as “years”), it most logically refers to the next in line, *e.g.*, the immediately preceding year.

The parties appear to agree as to the foregoing part of the analysis. It is from there on that they differ. For its part, Cascade asserts that

“* * *the language specifically used [in Article 6.3.1.(a)(1), OSAA Constitution] clearly states that OSAA must use the ADM for grades 9-12 reported by the Oregon Department of Education for the PREVIOUS school year. (Emphasis added.) The new four year time block [for which the assignment and districting process was conducted] starts with the 2018-2019 school year. The previous school year to the beginning of that new time block is the 2017-2018 school year. OSAA is not following its own process. OSAA is using an ADM number from the 2016-2017 school year which is two years earlier than the 2018-2019 school year. By * * * rule, Cascade must be given the opportunity to show OSAA their 2017-2018 ADM number, which is the [ADM number for the] previous year before the new time block begins.”

OSAA’s response to the foregoing argument is clear, if somewhat cursory.

OSAA states,

“* * *Even prior to this appeal, before the Board had made its final decision(s) regarding Classification and Districting, Cascade’s argument was the same—it asked that the OSAA ‘consider using the current school (2017-2018) adjusted enrollment numbers before making your final decisions* * *.’ Because the OSAA’s rules do not allow for acting on Cascade’s urged method of calculating ADM, the OSAA’s final decision was in compliance with its rules.”⁵

⁵ OSAA also asserted in its pretrial memorandum in this case that Cascade’s problem—if there really is one—is temporary at worst. It pointed to a provision in its Constitution, Article 6.2.4.(a), that deal with requests, like that of Cascade, to be placed in a lower classification: Schools may request permission to “play down,” *i.e.*, to be allowed to play in the next classification below that to which the school normally would be assigned by virtue of its ADM. This possibility also was

I do not believe that I unfairly expand on the foregoing statement if I reword it to state that the 2016-2017 ODE information, which came out in June, 2017, and was finally fully collated by OSAA in August, 2017, is the last general, reliable information that OSAA could point to in carrying out its responsibility for forecasting school population and appropriate classification sizes for the 2018-2022 block, *or at least OSAA was entitled to treat it that way.* It also appears (although the record is not wholly clear on this point) that the approach taken by the CDC to statistical information in this case is consistent with the methodology used by earlier committees respecting earlier quadrennial recalculations. In sum, OSAA contends that the remedy that Cascade seeks is unavailable.

As an answer to the purely linguistic issue presented by this case, OSAA appears to me to have the better of the argument. A “previous year,” as that phrase is used in Article 6.3.1.(a), OSAA Constitution, most logically should be both “previous” and “a year.” Cascade’s attempt to make the 2017-2018 school year into the reference year for establishing the 2018-2022 block ADM numbers suffers from the obvious problem that it does not encompass the full 2017-2018 school year. Indeed, as I prepare this Opinion, classes and competitions within that school

mentioned more than once in the testimony and discussion at the hearing. However, by the end of the hearing, OSAA seemed to recognize that Cascade’s competitive history is such that it could not qualify for such a change in its classification on the basis of Article 6.2.4.(a). I agree.

year are continuing, and will do so for over three more months. It thus appears that, where the word “previous” is used in Article 6.3.1.(a), it refers to the school year most recently *completed*—in this case, the 2016-2017 school year.

But that does not end the discussion. Cascade has another string to its bow in this part of the case. It points out that, once its proposed assignment to a 5A district was announced in the CDC’s final proposal and recommendation (“proposal #19”), but before the Board met to consider the CDC recommendation, it protested to the OSAA that its ADM was erroneously computed and that, when it was correctly computed, Cascade belonged in a 4A classification:

On September 21, 2017, Principal Matt Thatcher of Cascade sent a letter to the OSAA asserting that Cascade was being treated as if 35-40 students who were taking part in an institution called the “Cascade Opportunity Center” should be included in Cascade’s ADM, when the facts did not justify that inclusion. Mr. Thatcher informed OSAA that the Center had been established by Cascade but was, in fact, “a separate, online academy,” not a part of Cascade. It followed, he argued, that the students of the “Center” should not be treated as Cascade students

for purposes of its ADM. When those students are subtracted, he asserted, Cascade's ADM would be within the 4A classification range.⁶

OSAA does not respond to the merits of the foregoing argument, beyond stating that

“* * *[t]his case presents the question of whether one school can force the OSAA to deviate from its clear rules of calculating that school's enrollment, for purposes of placing the school within a classification.”

That is a clear position, but it may not be an apt one.

OSAA has many rules that touch upon the timing of classification and districting decisions. None of them, however, appear to touch on the quite obvious issue of what to do when an ADM is just plain wrong, whatever the reason may be for the error. OSAA may be hopeful that such an eventuality would never happen, but—what if it did? My reading of this record indicates that Cascade is saying that it has happened: there has been an arithmetical error that failed to take into account a 35-40 member group of students who were attributed to Cascade but who should not have been. The record in this case contains no information as to how the Board dealt with Cascade's complaint, beyond an assertion attributed to Mr. Weber, the

⁶ A separate letter from the Cascade athletic director pointed out a simple way that the two districts that would be affected by Cascade's reclassification request could be adjusted. On this record, OSAA has not questioned that argument.

Executive Director of the OSAA, who allegedly told Cascade representatives at the Board's October 16, 2017 meeting that the only ADM figures that the Board was going to consider were those from ODE. One suspects that the treatment of Cascade's complaint was a little more nuanced than that—everyone on both sides of this case is trying to achieve the same goal—but there is nothing before me to indicate even that the Board thought about the specifics of Cascade's protest, much less selected a principled way to deal with it.

That won't do. I acknowledge that OSAA's present rule regime does not explicitly deal with the present problem; the closest that it seems to come is its vesting of discretionary authority in the Board to change classifications "during a four-year time block." *See*, generally, Article 6.2., OSAA Constitution. But, if the Board retains discretion to make classification changes *during* a four-year time block, why does it not *a fortiori* have that discretionary authority if a sensible member school presents a reasoned argument before the time block even begins?⁷

I recognize that this construction of the appropriate way to treat Cascade's argument will require an adjustment in OSAA's position respecting its present

⁷ I note in this regard that any such request is supposed to be made so that the Board may make its decision "at the annual December Executive Board meeting." Article 6.2.3., OSAA Constitution. Here, the Cascade protest was made in time for the Board to consider it even earlier—in October, 2017.

rules, but no set of rules is intended to go on in perpetuity without occasionally being challenged by unexpected problems. My view is that the Board had, and continues to have (due to its delay in responding in a timely manner), the capacity to evaluate and, if appropriate, to grant Cascade's request for classification reassignment. There also may be many bases upon which the request can be denied—Cascade's facts may not be sufficiently clear, its mathematics may be inaccurate, or any number of other considerations may dictate the same outcome. But the Board must first recognize that it has discretion to deal with the merits of Cascade's position, must genuinely exercise that discretion, and must make a choice within the permissible range that discretion affords. The case must be remanded to the Board to carry out that function.

Argument Number 2.

Because of the disposition that I make of this case under the First Argument, I need not address the second. That does not, of course, mean that the Board is foreclosed from considering the Second Argument in the course of its reconsideration of the issue raised by the First Argument.

Opinion

I have included my rationale for the disposition of this case, and my reasons for adopting that rationale, in the body of the discussion. I therefore limit my opinion to a brief discussion of remedy.

Clearly, this case requires further consideration by the Board. Equally clearly, that reconsideration needs to occur soon. However, the timing of that reconsideration, and the way in which the discussion on reconsideration will be conducted, are matters for the Board to decide, at least in the first instance. From my point of view, it is important only that the Board understand the nature of the discretionary authority that it has the power to exercise.

The obvious first step is to remand this case for reconsideration by the Board. That will be the order. In ordinary court proceedings, a judge might also retain jurisdiction over the case to hear any further matters that might arise out of the reconsideration. However, as a Hearings Officer, I do not consider myself to be at liberty to preserve my own jurisdiction in that way. If, after reconsideration, the parties are of the view that I can be of assistance in bringing the case to a conclusion, I am at their disposal.

Conclusions of Law

The Board erred in failing to recognize that Cascade's request for reclassification was addressed to the Board's discretion, and that the disposition of that request therefore required a demonstration that the Board understood the extent of its authority and acted within it. The case must be remanded to the Board for further proceedings.

Order

The appeal of the decision of the Board denying Cascade High School's request for reclassification and redistricting is ALLOWED. The decision of the Board is REVERSED, and the case is REMANDED to the Board for further proceedings consistent with this Opinion.

ENTERED this 27th day of February, 2018.



W. Michael Gillette
Hearings Officer