

CASCADE UNION HIGH SCHOOL	)	
	)	NO. 2017-002
and	)	
	)	
OREGON SCHOOL	)	OPINION AFTER REMAND
ACTIVITIES ASSOCIATION	)	

Nature of the Proceeding

This contested case proceeding is before the undersigned Hearing Officer for a second time. In the original proceeding, conducted pursuant to Oregon School Activities Association (“OSAA”) Rule 9.2, the Cascade School District (“Cascade” or “the District”) challenged 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 asserted it should have been assigned by

¹ As explained in the original Opinion in this case, Oregon high schools that wish to take part in interscholastic competitions are members of OSAA, which the member schools have mutually agreed will supervise athletic and other interscholastic 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. Original Opinion at 1.

virtue of its attendance and history.² In the original Opinion written in response to that Appeal, the undersigned found that the OSAA's decision was potentially in error, due to a misunderstanding of OSAA's scope of discretionary authority concerning the issues presented in the case. The case therefore was remanded to OSAA for further proceedings. Opinion at 16-17. After reconsideration in light of that Opinion, OSAA issued a decision that reassessed certain facts at issue and the law applicable to those facts, but affirmed OSAA's assignment of Cascade to a "5A" conference. Cascade now seeks review of that decision.³

The District's present appeal was heard by the undersigned Hearings Officer on Tuesday, March 3, 2018, at the OSAA offices at 25200 S.W. Parkway, Suite 1, Wilsonville, Oregon.. The hearing commenced at 10:00 a.m. and concluded at 11:30 a.m. on that date. The District was once again represented by its Superintendent, Daren Drill. OSAA was once again represented by Jon Radmacher, esq., Portland.

² As noted in the Original Opinion at 2, Cascade historically has been a part of a 4A conference that also included Stayton, North Marion, Philomath, Yamhill-Carlton, and Newport.

³ As was true respecting Cascade's original appeal, 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 original Opinion volunteered the undersigned as Hearing Officer to conduct any further proceedings that might become necessary as a result of the Board's decision on remand. Original Opinion at 16-17. Cascade's appeal has made further proceedings necessary, and the parties have again selected the undersigned to conduct them.

Because the essential facts were agreed upon, the case on remand was treated in a manner that one might normally use to decide a petition for judicial review of an order in a contested case under the Oregon Administrative Procedures Act.⁴ The matter was then taken under advisement. Considering the record and the arguments of the parties, and being fully advised, the undersigned now enters the following Order After Remand.

Historical and Contextual Setting

The original Opinion in this case contained a number of sections devoted to the nature and history of Cascade and its athletic activities, together with sections dealing with the nature of the two leagues into which Cascade had a reasonable belief, at one time or another, that it might be placed. The original Opinion also discussed at length the year-long work of OSAA's Classification and Districting Committee (the "CDC") in proposing the designation of the numerical boundaries of competition classifications ("1A" to "6A"), as well as in proposing the assignment of various classification groups into leagues, districts, or conferences. Finally, the original Opinion described the decision reached by OSAA's Executive

⁴ As one would expect, the proceedings were cordial, professional, and business-like. As the undersigned had occasion to do in the original Opinion, he once again thanks the representatives of the parties for their professionalism.

Board (“the Board”) that placed Cascade in a “5A” classification and district. The parties are familiar with all those facts; most need not be repeated here.

Cascade’s Initial Appeal

In its initial Appeal, Cascade presented two legal arguments. The original Opinion ruled that at least a part of one of those arguments, *viz.*, an argument that the Board was using the wrong number as Cascade’s “ADM” number when it assigned Cascade to a “5A” classification, was well taken.⁵ Opinion at 14-17. That part of the original Opinion is set forth below at some length, because it serves as the basis of both the Board’s position on remand and the undersigned’s disposition of the Board’s arguments:

“Cascade points out that, once its proposed assignment to a 5A district was announced in the CDC’s final proposal and recommendation * * *, but before the Board met to consider the CDC recommendation, [Cascade] protested to the OSAA that its ADM^[6] was erroneously computed and that, when it was correctly computed, Cascade belonged in a 4A classification:

⁵ For a description of the “ADM”: number, *see* footnote 1, *supra*, at page 1.

⁶ At this point, a more complete explanation of the “ADM” is appropriate. “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 SES factor.

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

“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 [Cascade’s] ADM. When those students are subtracted, he asserted, Cascade’s ADM would be within the 4A classification range.

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

“(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:

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

“* * * * *.

(Emphasis added.)

‘* * *[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, appears 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? [The Hearing Officer’s] 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-[to]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 Executive Director of the OSAA, who allegedly told Cascade representatives at the Board’s October 16, 2017, meeting that the ADM figures that the Board was going to consider were those from [the Oregon Department of Education]—period. 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. [The undersigned] acknowledge[s] 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 before the time block even begins?

“[The undersigned] recognize[s] that this construction of Cascade’s argument will require an adjustment in OSAA’s position respecting its rules, but no set of rules is intended to go on in perpetuity without occasionally being challenged by unexpected problems. [The undersigned’s] 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 deal with Cascade’s request for

classification reassignment. There 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 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.”

Analysis of OSAA’s Decision on Remand

On remand, the OSAA Board took the matter under advisement and, after consider deliberation, issued a decision in which the Board, by a vote of 7-4, rejected Cascade’s appeal.⁷ The following lengthy quote from the Board’s decision contains all the Board’s rationale that relates to the disposition of this matter:

“Pursuant to Article 6.1.2. [of the OSAA Constitution], a school may provide the Executive Board with information about potential enrollment during a four-year time block, which information can be provided at any time during the Classification and Districting Process; in September and October 2017, Cascade HS provided information to the Committee and the Executive Board late in the Classification and Districting Process, regarding a charter school of 47 students otherwise counted (in the prior school year) within Cascade HS’s ADM.

“Pursuant to Article 6.2.3, at the December meeting of the Executive Board, the Board may consider classification change requests made during a

⁷ The split in the Board’s decision is mentioned as a matter of historical fact, but it is not a legally significant one. The conclusion reached in this Opinion on Remand would not be different, even if the Board had been unanimous: a body of several members can be right legally or can be wrong legally without regard to counting noses. Were that not true, no unanimous jury verdict would ever be overturned for legal error.

four-year time block; pursuant to Article 6.2.2(b), the Board has the discretion to consider a school's petition for an 'emergency placement' in a lower classification.

“* * *[The Hearing Officer] ruled that the Board erred in not exercising its discretion to consider the change in enrollment information submitted by Cascade High School, which change was premised on the creation of a charter school that resulted in those charter school students no longer being counted within Cascade High School's enrollment, and remanded the case back to the Executive Board to exercise its discretion.

“* * * * *

“The Board met in three executive sessions and debated the matter(s) remanded to the Board, and decided to exercise its discretion in considering whether students attending the Cascade charter school should or should not be counted as part of Cascade High School's ADM, for purposes of classification during the 2018-2022 time block. In exercising this discretion, the OSAA did not consider any petitioning school's enrollment data for other than the previous school year, as the starting point for classification, because (a) it would violate the OSAA's ADM rule, and (b) every school would be able to submit 'new' information that would change classification cutoffs and proposed districts throughout the association. *Nonetheless, the Board considered Cascade HS's information about its charter school affecting its prospective enrollment.* Having considered those matters, the Board voted 7-4 to deny Cascade High School's petition/request to be placed in the 4A classification* * *.”

(Underline in original; italics added.)

The Board then set forth five reasons that a majority of its members considered appropriate bases for denying Cascade's request to be placed in a 4A, rather than a 5A, conference. Those reasons, too, need to be set out at length. However, the matters already quoted need to be highlighted in certain respects.

First, it appears that the Board reserves the right to begin any calculation of a member school's ADM with the numbers made available to it by the Oregon Department of Education respecting that school's attendance history in the "previous" school year.⁸ Of course, the Board could have selected some other benchmark, but selecting the one that it selected makes sense in view of the task that the Board had to perform. Thus, it appears that the Board *had discretion* as to that question, and that it exercised it. Moreover, the Board's choice appears to be a permissible one: It assures that all final calculations begin from a common source, subject to adjustments in certain circumstances that are school-specific. There was no abuse of discretion in this respect.

Second, it appears that the Board recognized that it was obligated under its own rules to accept and consider evidence offered by Cascade concerning Cascade's projected school population during the forthcoming four-year period. Such a ruling is consistent with the undersigned's mandate to the Board in the original Opinion in this case (the information was provided during the time period specifically set forth in Article 6.1.2, OSAA Constitution, and the Board considered it); there is no abuse of discretion in this respect.

⁸ The word "previous" is placed in quotation marks, because a good deal of the original opinion in this case dealt with differences of opinion between OSAA and Cascade concerning just what the "previous" school year was. The undersigned ruled in favor of OSAA on that issue.

A third consideration, however, creates a different problem. In remanding the case to the Board for further consideration, the undersigned specifically highlighted an omission in the Board's Constitution and rules that it would be necessary for the Board to resolve, in order to properly consider Cascade's request that it be classified as a 4A school and be assigned to a conference of such schools. Although set forth earlier, it seems worthwhile to set out again the pertinent parts of the original Opinion:

“OSAA has many rules that touch upon the timing of classification and districting decisions. None of them, however, appears 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? [The Hearing Officer's] 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-[to]40[-] member group of students who were attributed to Cascade but who should not have been.* * * but there is nothing before [the Hearing Officer] 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. [The undersigned] acknowledge[s] 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 before the time block even begins?”

Unfortunately, it appears from the Board's decision on remand that the Board chose to consider only the “emergency placement” power that it has under Article 6.2.3. of the OSAA Constitution. It is true that there was a reference to that

authority in the original Opinion. But the citation to that source of authority in the original Opinion was not intended, and should not have been read to intend, to limit the Board's duty only to an application of that authority. If no rule fit the problem, the Board's duty was to recognize that nothing in its Constitution or rules answered the problem presented, but then to use its discretion to solve the problem in a way that the Board could demonstrate properly considered the competing considerations that were involved. The undersigned's discussion in the original Opinion of a situation in which a school's ADM appears to be "just plain wrong," and the assertion that a Board with discretion to change classifications or assignments during a four-year time block *a fortiori*⁹ has the power to make changes based on reliable information provided before the time block begins, clearly required more of the Board than what it chose to do.

The Board's five specific justifications for its decision highlight the foregoing problem. They are set out and discussed in order below:

⁹ The use by the undersigned of the term, "*a fortiori*," may have confused the issue. Use of the term was not intended to challenge anyone's background in Latin and, if it has been read that way, the undersigned apologizes. The term's usage is most familiar in law and in debate. It means "stronger" or "with more convincing force," and is commonly used as a follow-up to a well-recognized proposition. Thus, one may say, "The man of prejudice is, *a fortiori*, a man of limited mental vision." In the present case, it means that a Board which has the power under some circumstances to alter classification and district decisions after the beginning of a four-year cycle must surely have the authority ("*a fortiori*"), while the classification and districting decisions are still to be made, to correct errors that would affect the validity of the entire scheme.

“[1.] When the Board considers a school’s Petition under Article 6.2.2(b) at December meetings, it has traditionally not granted a Petition for ‘emergency placement’ in a lower classification, unless the school’s adjusted enrollment has dropped to roughly 7-10% less than the classification threshold. In this case, treating Cascade’s request as if it were a request made at a December meeting during the 4-year time block, its enrollment would be only 3.3% less than the classification cutoff: if Cascade’s 756 ADM for the 2016-2017 year is adjusted by the 47 students that Cascade reported to the Board that were attending its charter school, to 709, and is then further adjusted based upon its 37% free lunch number (resulting in a 66 student reduction), its adjusted ADM would be 643, or 22 students less than the 5A classification cutoff. That 643 enrollment figure is 3.3% less than the 5A classification cutoff, a percentage that has historically been inadequate to convince the Board to allow an emergency placement in a lower classification under 6.2.2(b). In other words, with the statistics presented by Cascade HS, the Board would not grant a request under 6.2.2(b) to play at a lower classification.”

This justification, which relies on what appear to be certain unpublished “rules of thumb” that have traditionally governed the Board’s consideration of “emergency placement” requests, is wholly unresponsive to the issue presented to the Board. Cascade specifically noted in its presentation on rehearing that it was not requesting “emergency placement;” it was asking that an arithmetical error be corrected so that it could be appropriately classified and assigned to a district *as an initial matter, i.e.,* from the outset of the 4year block. This case does not differ in principle, nor should it differ in outcome, from a situation in which a school informs the CDM and the Board that the Department of Education simply recorded the figures reported by the school to the Department inaccurately, and that recordation error resulted in the school being placed in a classification in which it

did not belong. If the OSAA has no rule covering such an eventuality, it needs one. Without such a rule, or at least without an explanation of the basis for its choice when there is no rule that would justify the Board's action, it is impossible to establish just what the permissible range of choices by the Board would be (much less determine whether the choice that the Board made was within the permissible range). This explanation manifests an abuse of discretion; it does not justify the Board's decision.

“[2.] The request is not equivalent to a district opening a new full member high school. When Redmond High School petitioned for an ‘emergency placement’ in December 2011, for the 2012-2013 school year due to the anticipated opening of Ridgeview High School, its enrollment went from 1800 to 1097, which was 26% less than the 6A classification figure.”

Once again: Cascade is not requesting an “emergency placement.” The foregoing discussion therefore is unresponsive to what actually is at issue in this case. It does nothing to demonstrate a defensible exercise of discretion by the Board.

“[3.] The Cascade SD could make the charter school students eligible at Cascade HS by applying for associate membership.”

It could, but its request includes an at least tacit promise that it will do no such thing. Certainly, there is nothing in this record to justify any suspicion that Cascade's petition is some kind of subterfuge. Put differently: If the mere possibility that a school is not revealing everything, with nothing in record to

support such a suspicion, is enough to permit denial of an otherwise reasonable request, the entire process is reduced to the question whether anyone on the Board can think of a possible dark motive for the request. OSAA surely does not wish to be known for such views and, in any event, the idea does not create a permissive discretionary choice.

“[4.] Cascade’s enrollment adjustment due to the charter school is not a major event like a natural disaster or the closing of a major employer that would demonstrably and significantly reduce a school’s enrollment.”

But Cascade is not asking for an enrollment adjustment due to some unanticipated, catastrophic event. It is asking, instead, that its ADM be a correct one, the way every other school’s ADM is presumed to be correct, at the beginning of a 4-year competition cycle. Again, this justification fails to address the point.

“[5.] Cascade HS’s arguments about its enrollment at the beginning of the 2017-2018 school year are rejected, because those numbers change for every school throughout the year, and it would encourage every school to provide information inconsistent with the rule, and because it would also then require that the OSAA look at moving schools to a higher classification if their Fall enrollment was higher than their ‘previous year’ enrollment.”

With respect, that argument actually boils down to an assertion—which OSAA should not mean to make—that being fair takes too much time or is too much trouble. Or, to put it slightly differently: It is a “floodgates” argument and, like most such arguments, is not valid just because there has been a single troublesome case. As was pointed out in the original Opinion, this is not a case

about events that happen after the beginning of a 4-year block: From the beginning, Cascade pointed out an arithmetic error before any classification or districting decision based on that error had been set in stone. Requiring the Board to deal with that issue on its merits says nothing about issues not timely raised, or raised after the beginning of a 4-year competition cycle. Moreover, OSAA has the ability to change its Constitution. If it feels threatened by the burden of possible appeals by other schools in the future, its first line of defense is to create a set of standards that deal with them consistently. But, until it either takes that route or responds to requests like that from Cascade in a manner which truly recognizes the issue and presents a solution that can be defended as a discretionary choice, any problem that it prophesies will have been entirely of its own making.

Conclusion of Law

Based on the reasons set out above, the undersigned concludes that OSAA's decision on remand does not demonstrate a defensible exercise of its discretion. The Board's decision consistently misapprehends Cascade's position and, fortified by that misunderstanding, then offers reasons for its decision that are unresponsive to the issue actually presented to the Board. The Board has abused its discretion, and therefore erred. That leaves the issue of remedy.

Remedy

During the hearing after remand in this case, the undersigned asked counsel for OSAA if the undersigned's powers included the authority to enter a ruling in favor of Cascade and an order reassigning Cascade. After a brief consultation with the OSAA Executive Director, counsel advised the undersigned that he did, in fact, have that authority.

Having such authority does not always justify using it, but this Hearing Officer is convinced that the time has come to end this case. Although it differs with Cascade on what the consequences should be, OSAA appears to recognize that, at the end of the CDC process, Cascade's correct ADM was such that it properly should have been assigned a 4A classification. Certainly, none of OSAA's arguments demonstrate the contrary. The undersigned therefore

FINDS:

- (1) that Cascade was, and ought to be assigned as, a 4A school; and
- (2) that the appropriate district in which Cascade should be placed is the 4A-3 Oregon West Conference.

It therefore is

ORDERED:

(1) that Cascade's appeal in the present case is ALLOWED; and

(2) that Cascade be assigned to an athletic conference in accordance with this opinion.

ENTERED this 29th day of April, 2018.

W. Michael Gillette

Hearing Officer