

**IOWA DEPARTMENT
OF EDUCATION**
(Cite as 22 D.o.E. App. Dec. 20)

In re Petition for Waiver of Rule :
Board of Education of Don Bosco High : **ORDER**
School, :
Petitioner. : [Admin. Doc. #4534]

On or about February 21, 2003, Administrators from Don Bosco High School, an accredited nonpublic school located in Gilbertville, Iowa, filed a petition with this agency requesting a waiver from administrative rule 281 Iowa Administrative Code 37.7. Notice of receipt of the petition was duly provided to interested persons, to whom opportunity to comment was provided.

Authority for filing and ruling on petitions for waiver is found in 281 IAC 4. Because the petition herein was not filed within a contested case proceeding and because a hearing is not required by statute, rule, or order, no hearing was held. *See* 281 IAC 4.9. The undersigned considered the facts, the criteria for waiver in chapter 4, and the information submitted by interested persons in ruling on the petition.

**I
FINDINGS OF FACT**

As a member of both the Iowa High School Athletic Association and the Iowa Girls High School Athletic Union, Don Bosco fields extracurricular athletic teams in most sports sanctioned by those organizations. From 1985 until four years ago, Don Bosco was a member of the Iowa Star Conference. According to its athletic director, Don Bosco voluntarily left that conference because the other member schools could not field junior varsity teams, thus giving Don Bosco students fewer competitive opportunities. Don Bosco joined the WaMaC Activities Conference four years ago and has been a member of the WaMaC since then.

In the winter of 2001-2002, this agency held an appeal hearing regarding the realignment of two activities conferences, including the WaMaC. As a result of the hearing, the undersigned ordered that four schools become new members of the WaMaC, effective with the 2003-2004 school year, increasing the number of WaMaC members from 8 to 12. *In re Petition for Activities Conference Realignment*, 20 D.o.E. App. Dec. 197 (2002). The decision concluded, “These conference realignments are binding on Petitioners ... and on all members of the WAMAC Conference for a four-year period, through the end of the 2006-2007 school year, pursuant to 281 Iowa Administrative Code 37.7.”

In its petition for waiver, Don Bosco asks to be released from the WaMaC prior to the end of the “status quo” period of four years mandated in rule 37.7. Don Bosco states that it wishes to join the North Iowa Cedar League (NICL) or, in the alternative, rejoin the Iowa Star Conference. Don Bosco asserts that the disparity in enrollment sizes between itself and other WaMaC members, as well as its average travel distance, would be decreased in the NICL from what it now experiences in the WaMaC.

At page 203 of the above-referenced WaMaC decision, this agency summarized the enrollment and travel information as follows (those in **bold** are the new, incoming conference members):

WaMaC Member Schools	9 – 11 BEDS ¹ Enrollment
Western Dubuque	583
West Delaware	544
DeWitt Central Clinton	463
Benton Community	430
Marion	427
Independence	420
Maquoketa	419
Vinton-Shellsburg	418
South Tama	407
Waterloo Columbus	354
Dyersville Beckman	265
Don Bosco	147
Average without four new members	393 ²
Average with four new members	406

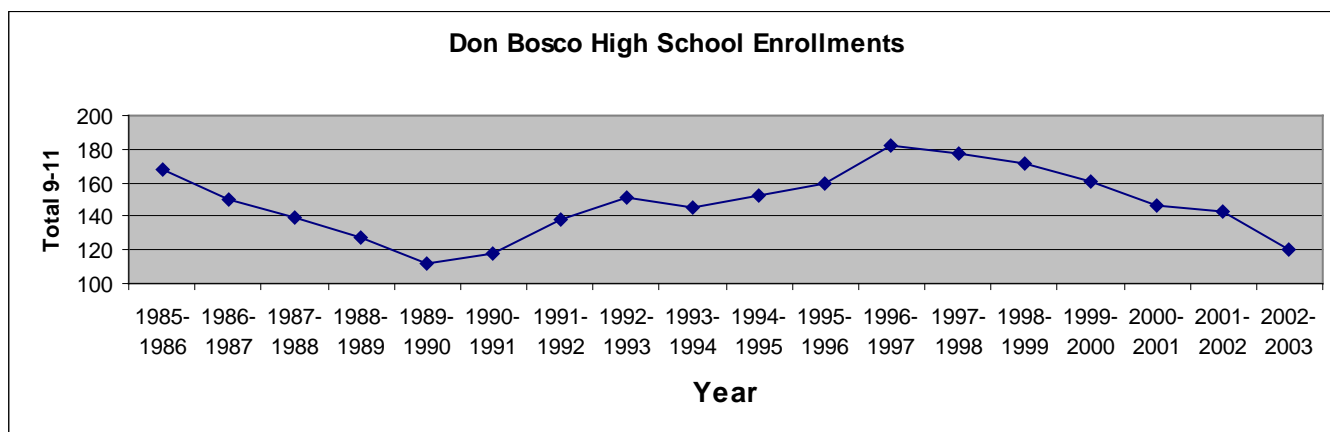
WaMac Member	Avg. one-way mileage w/ new members	Avg. one-way mileage with new members	Additional One-way mileage
South Tama	56 miles	81 miles	25 miles
Waterloo Columbus	38 miles	58 miles	20 miles
Benton Comm.	38 miles	57 miles	19 miles
<i>Don Bosco</i>	<i>36 miles</i>	<i>54 miles</i>	<i>18 miles</i>
Vinton-Shellsburg	40 miles	55 miles	15 miles
Independence	38 miles	52 miles	14 miles
Marion	44 miles	49 miles	5 miles
West Delaware	54 miles	55 miles	1 mile
Mean additional one-way mileage			14.6 miles

¹ These enrollment figures are from the 2000-2001 Basic Educational Data Survey.

² This agency’s decision at 20 D.o.E. App. Dec. 197 reports this average to be 428, an error in the math that did not affect the ultimate decision in that case.

The enrollment figures for Don Bosco (grades 9 – 11 only, to be consistent with the above information) since 1985-86 are as follows, presented first in chart form and then on a graph. The source for all enrollment figures used above is the Iowa Department of Education, Basic Educational Data Survey, enrollment files.

<u>Year</u>	<u>G 9</u>	<u>G 10</u>	<u>G 11</u>	<u>Total 9-11</u>
1985-86	49	67	52	168
1986-87	42	44	64	150
1987-88	53	42	44	139
1988-89	41	47	39	127
1989-90	30	38	44	112
1990-91	49	32	37	118
1991-92	58	48	32	138
1992-93	47	56	48	151
1993-94	45	45	55	145
1994-95	65	44	43	152
1995-96	53	64	43	160
1996-97	66	55	61	182
1997-98	60	65	52	177
1998-99	49	60	63	172
1999-00	54	50	57	161
2000-01	49	53	45	147
2001-02	43	48	52	143
2002-03	40	41	49	130



All current member schools of the WaMaC, NACL, and Iowa Star Conference were given notice of the filing of the petition herein, and opportunity to file written comments with this agency. Responses were received from a spokesperson for the NACL, from a present member of the WaMaC, and from an incoming member of the WaMaC. No response was received from a representative of the Iowa Star Conference.

On behalf of the NICL, the Eldora-New Providence superintendent wrote that the League unanimously disapproved of Don Bosco's request to join them. The three reasons cited by the NICL are as follows:

1. Don Bosco willingly joined the WaMaC, and is not left without a conference because of the NICL's refusal to voluntarily admit it.
2. Don Bosco has no supporting junior high or middle school program, giving the NICL athletic directors no option of scheduling competitions at that level.
3. Don Bosco does not field high school teams in football, golf, tennis, or track.³

The Eldora-New Providence superintendent concludes, "In short, adding them [Don Bosco] to our conference causes more problems than it helps."

Both the current and incoming members of the WaMaC who filed responses expressed reservations about Don Bosco's petition. The superintendent of West Delaware explained that travel concerns would be "mitigated by the expectations that the WaMaC would be a twelve-team, two-division (by geography) conference." He also noted that the present WaMaC members have all expressed willingness to let Don Bosco out of the conference if a replacement is found so that the WaMaC will have continuity as a 12-member conference. The members even authorized the WaMaC president to proactively check with several schools to see if they might find a more appropriate home in the WaMaC than in their present conference. This agency has not been made aware of any progress in that regard, but does not discourage those attempts.

One of the incoming WaMaC members, Central Clinton of DeWitt, echoed West Delaware's sentiments about maintaining 12 members in the conference. Permitting Don Bosco to leave prematurely, subject to finding a suitable replacement, should be left to the discretion of the WaMaC, in the opinion of Central Clinton of DeWitt.

II CONCLUSIONS OF LAW

The set of rules regarding extracurricular athletic activity conferences is at 281 Iowa Administrative Code [IAC] 37. When local school administrators are unable to resolve conference alignment disputes and when chapter 37 mediation does not

³ Don Bosco does field boys and girls golf teams. It has cooperative sharing with Waterloo Columbus – a fellow WaMaC member – for tennis and track. Its status for football is irrelevant because football competition for all but 4A schools in Iowa is by district, not by conference.

lead to resolution, the rules provide for final decisions to be made by the undersigned. This process led to our Order realigning the WaMaC and another conference, *In re Petition for Activities Conference Realignment*, 20 D.o.E. App. Dec. 197 (2002). The specific rule from which Don Bosco seeks waiver, 281 IAC 37.7, states as follows:

281-37.7 Effective date of the decision. If the decision [*of the director*] requires conference realignment, the date of this change shall be made with deference given to existing contracts and commitments. Alignment changes shall be made for four-year periods with automatic review by the director after two years so that further necessary changes take effect at the conclusion of the four-year period, unless agreement exists that implementation of the change can occur at an earlier date.

When a petition for waiver is filed under 281 IAC 4, the agency director must find all of the following criteria:

1. The application of the rule to the petitioner would result in an undue hardship to the petitioner.
2. Waiver would not prejudice the substantial legal rights of any person.
3. The provisions of the rule from which waiver is sought are not mandated by statute or other provision of law.
4. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the rule from which waiver is sought.
5. Waiver would not have a negative impact on the student achievement of any person.

281 IAC 4.4.

The burden of persuasion rests with the petitioner, Don Bosco, to demonstrate the above criteria by clear and convincing evidence, a more stringent standard than the “preponderance of the evidence” standard. 281 IAC 4.10(2). If granted, a waiver shall provide the narrowest exception possible to the provisions of the rule. 281 IAC 4.10(3). The agency director may place any condition on a waiver that the director finds desirable to protect the public health, safety, and welfare. 281 IAC 4.10(5).

The third criterion

We begin with an examination of the third of the five criteria listed in 281 IAC 4.4 because if the provisions of rule 37.7 are mandated by a statute or other provision of law, it is not within the authority of this agency to grant a waiver from the rule. Therefore, our analysis starts with this criterion. The very brief mention in our statutes of athletic conferences does not address any of the details covered in chapter 37, much less the substance of rule 37.7. Therefore, the provisions of rule 37.7 are not mandated by any provision of law. Don Bosco – or any other petitioner – may request waiver from the rule in question.

The second, fourth, and fifth criteria

Three of the remaining four criteria for waiver in rule 4.4 (numbers 2, 4, and 5 above) are designed to make sure that a person other than the petitioner will not be adversely affected if a waiver is granted.⁴ Another way to view these criteria in concert is to pose the question, what is the rationale for the four-year “status quo” period?

The four-year requirement is not an arbitrary, whimsical mandate. When conferences realign, schedules must be redrawn and new governing documents and handbooks must be drafted, approved and disseminated to all members and their students. Reasonable expectations by the members arise in anticipation of stability for at least four years following the realignment. If a member were allowed to switch conferences at any time following a realignment, a school in the new conference could do the same, and so on. The resulting domino effect is the antithesis of the goals of stability and predictability that underlies rule 37.7.

The goals underlying the four-year requirement are understandably important to conference members. But are they legally sufficient to deny Don Bosco’s request for waiver of rule 37.7? The provisions of chapter 37 must apply equally to all conference members. However, these provisions are but protections and expectations; they cannot be said to rise to the level of “substantial legal rights.” The same is true of Don Bosco’s request; it is not grounded on any “substantial legal right.” With the exception of the fifth criterion⁵, these criteria result in a neutral finding that favors neither Don Bosco nor the other members of the WaMaC. Accordingly, we are left to examine whether failure to grant a waiver would result in an undue hardship on Don Bosco.

⁴ “Person is defined in 281 IAC 4.1 as “an individual, school corporation, government or governmental subdivision or agency, nonpublic school, partnership or association, or any legal entity.”

⁵ The fifth criterion can quickly be decided in favor of Don Bosco, as a waiver from the four year requirement in rule 37.7 cannot be said to have a negative impact on student achievement.

The first criterion

As previously stated, Don Bosco contends that it would suffer undue hardship in two ways, disparity in enrollment figures and increased travel. The average enrollment size of the WaMaC members increased by only 13 members (grades 9 – 11) with the addition of the four incoming members. Unquestionably, Don Bosco is the smallest member of the WaMaC. However, whereas prior to the realignment the next smallest school was far more than double in size than Don Bosco (Waterloo Columbus' 354 students compared to Don Bosco's 147), with the realignment one of the new members is much closer in size to Don Bosco (Dyersville Beckman with 265 students).

Don Bosco argues that it is not just the smallest member of the WaMaC, but that its enrollment is declining, so that it will be further disadvantaged in the realigned WaMaC. A review of Don Bosco's enrollment figures shown above, however, shows that Don Bosco's enrollment has had peaks and valleys. Indeed, from a low of 112 students in the 1989-90 school year, Don Bosco was able in just seven years to increase its enrollment to 182 students, an increase of over 60%. As a nonpublic school, Don Bosco is not limited by geography or district boundaries from which to draw students. It is more in control of its ability to increase its enrollment than is a school district. We cannot conclude that Don Bosco's enrollment has declined in a steady fashion such as would enable one to predict with confidence that further decline is inevitable.

The travel concerns raised by Don Bosco are not unique to that school. Its average increased one way travel in the realigned WaMaC is just 3.4 miles greater than the conference average. Three WaMaC members are impacted to a greater degree than is Don Bosco regarding travel. It appears to be a fact of life for all Iowa schools and school districts that extracurricular activity travel concerns are not going to abate in the near future. It also appears that the WaMaC is responding appropriately to mitigate travel burdens of its members by creating two geographical divisions within the conference for competition.⁶

I conclude Don Bosco has failed to show by clear and convincing evidence that either enrollment or travel concerns constitute an undue hardship for it such that its petition for waiver from rule 37.7 should be granted.

⁶ Don Bosco's point that it would have shorter distances to travel in the NICL is meaningless, given that the NICL refuses to accept Don Bosco as a member. We remind all interested persons that we cannot, via a chapter 4 waiver action such as this one, order any conference to accept any school as a member.

III
DECISION

For the foregoing reasons, the petition for waiver is DENIED. All interested persons are reminded, however, that this agency consistently has stated that changes in conference memberships may occur at any time with the consent of the affected conferences. Accordingly, if the WaMaC membership determines that a suitable replacement member for Don Bosco has stepped forward, and if Don Bosco finds a willing home with another conference, Don Bosco may leave the WaMaC at that time.

Date

Ted Stilwill, Director