

STATE DEPARTMENT OF EDUCATION
(Cite as 17 D.o.E. App. Dec. 247)

In re Petition of Williamsburg Community School District for Membership into the Eastern Iowa Hawkeye Conference : **DECISION**
: **[Adm. Doc. #4131]**

The above-captioned matter was heard on June 24, 1999, before a hearing panel comprising Evelyn Anderson, chief, Bureau of Community Colleges; Joseph DeHart, consultant, Bureau of Planning, Research & Evaluation; and Ann Marie Brick, J.D., legal consultant and designated administrative law judge, presiding on behalf of Ted Stilwill, Director of the Department of Education. Petitioner, Williamsburg Community School District [hereinafter, "Williamsburg"], was present in the persons of Board President Thomas Claypool, who is also an attorney; Superintendent Bill Thompson; High School Principal Steve Johns; and Activities Director William Neal.

The Eastern Iowa Hawkeye Conference [hereinafter, "the EIHC"] was represented by the following individuals: Tom McDonald, president of the EIHC and principal of Clear Creek-Amana High School; Larry Meister, principal of Solon High School; Adrian Ringgold, superintendent of Mt. Vernon Community School District; and James Martinek, Solon Community School District board member, who is also an attorney.

This appeal hearing was held pursuant to the provisions of 281 Iowa Administrative Code 37. Section 37 provides for an appeal to the Director of the Department of Education after the mediation process provided for by the rule fails to resolve the petitioner's request for conference realignment. Each of the representatives was allowed to present and argue evidence in support of his school's position. Sworn testimony was not taken as the hearing was conducted informally.

I.
FINDINGS OF FACT

The administrative law judge finds that she and the Director of the Department of Education have jurisdiction over the parties and subject matter of the appeal before them. 281 IAC 37. *See, e.g.*, Iowa Code section 280.13(1999).

Procedural Background:

Williamsburg seeks membership into the EIHC. Williamsburg has applied for membership in the EIHC since 1996 and has been denied on each occasion. When Williamsburg first sought membership in the EIHC in 1996, it was a member of the South

Iowa Cedar League [SICL]. The SICL is an activities conference of schools lying primarily to the west of Williamsburg. Williamsburg joined that conference in 1960. The membership in the SICL and enrollment figures for grades 9-11 for the 1998-99 school year are:

Williamsburg	238
Montezuma	165
Belle Plaine	164
Sigourney	162
North Mahaska	151
B-G-M	148
Iowa Valley	148
English Valleys	143
Lynnville-Sully	135
Keota	120
H-L-V	119
Tri-County	103

Williamsburg's enrollment is significantly larger (44%) than the next largest school and over two times larger than the smallest school in the SICL. Projections indicate that Williamsburg's enrollment will continue to grow and that enrollment in the other schools will be stable or decline.

When Williamsburg's relative growth contrasted with the loss of student population by other SICL conference schools became apparent in 1996, Williamsburg sent a letter to the EIHC asking consideration for membership. Williamsburg was denied.

In 1998, Williamsburg reinstated its request for admission to the EIHC by letter and asked to appear at an EIHC conference meeting. Both requests were denied. At its Board meeting on December 17, 1998, the Board voted to drop out of the SICL and petition the Department of Education and the state athletic associations to assign Williamsburg to a conference with school districts of similar size. The SICL schools were notified at the December meeting. Williamsburg agreed to meet the SICL constitutional requirement of one-year notice. As a result, Williamsburg will be an independent at the end of the year 2000 baseball/softball season if no new conference affiliation is obtained.

During the first part of 1999, Williamsburg was invited to make a presentation to the EIHC at their regular February meeting. Six other schools also made presentations. In addition, the Williamsburg Athletic Director attended a February realignment meeting with representatives of the Big Bend, Tri-River, and Big East conference schools. No suitable conference realignment possibilities were developed at the meeting. On February 19, 1999, Williamsburg received notification of rejection on admission to the EIHC.

The EIHC is a conference of ten schools situated to the east of Williamsburg. Two of the EIHC members (Clear Creek-Amana and Mid-Prairie) adjoin the Williamsburg District. The schools comprising the membership of the EIHC and enrollment figures for grades 9-11 for the 1998-99 school year are:

West Liberty	302
Clear Creek-Amana	255
Mt. Vernon	254
Solon	244
Mid-Prairie	230
Tipton	229
Wilton	206
West Branch	193
Durant	169
Iowa City Regina	168

With its current enrollment of 238, Williamsburg would be the fifth largest 9-11 enrollment in the EIHC. The EIHC schools are very similar in size to Williamsburg. The smallest school in the EIHC is larger than any school in the SICL, except Williamsburg. The average EIHC high school enrollment is 227 students, which is only slightly below Williamsburg's enrollment.

In terms of distance, the farthest school from Williamsburg is Durant at 66 miles. However, the travel route is along Interstate 80. The shortest trip is 24 miles. The average distance is 48 miles. Most of the traveling to Williamsburg would be along Interstate 80 or Highway 380, in the case of Mt. Vernon.

Nevertheless, Williamsburg was rejected for membership into the EIHC. From the evidence presented at the appeal hearing, the EIHC members share three objections to the admission of Williamsburg into their conference. The three objections are summarized and listed in the order of their importance as follows:

1. Williamsburg should not be allowed into the conference because it was not an "independent" at the time it filed a complaint with the Department of Education on March 3, 1999. Since Williamsburg voluntarily withdrew from the SICL conference by Board action on December 17, 1998, it cannot use the chapter 37 provisions to seek membership in a different conference. This position was mentioned by the mediation team in its recommendations to the Director.

2. Representatives of the EIHC stated that Williamsburg is seeking more opportunities for its 7th, 8th, and 9th grade teams in various sports. These opportunities are unavailable for Williamsburg in the SICL. While acknowledging that this is true, members of the EIHC do not feel that concerns about opportunities for these younger athletes is relevant since the EIHC is a 9-12 conference.
3. As stated in the mediation team report prepared by David Bechtel, the EIHC believes that "maintaining its 10-team structure, which has been in place for many years, provides the best and most stable activity programs for the students of its member schools. The conference did not feel it should have to disrupt the programs it has offered for approximately 2,300 students to accommodate the interests of the approximately 240 students of Williamsburg." (Mediation Recommendation, p. 3.)

Williamsburg responded to each of the three objections stated above as follows¹:

1. The Mediation Team, and later the EIHC member schools, questioned whether Williamsburg could seek the help of the Department of Education under chapter 37 because Williamsburg is not "involuntarily" independent since an affirmative action was taken by it to establish its status. These points were raised by the Mediation Team because of language contained within a prior administrative decision by the Department in 1992. *In re Petition of Carroll Community School District*, 9 D.o.E. App. Dec. 251 (1992). This position was reiterated by David Bechtel in his mediation report, where he states as follows:

We would question the applicability of this complaint to the provisions of IAC 281-37 and would question why it was directed for mediation. Since the initiation of actions under the provisions of IAC 281-37, which became effective January 15, 1992, the team has felt the following policies were to be followed:

1. *A school or school district seeking relief under this chapter could not be a current member of an athletic activities conference. It had to be an "independent" seeking conference membership.*

¹ Because Thomas Claypool is also an attorney, he filed a legal brief to respond to the jurisdictional issues raised by the Mediation Team and the EIHC.

2. *The independent status of a school or school district had to be "involuntary". A school or school district by its own action could not drop membership in a conference and then use the provisions of IAC 281-37 to gain membership in a conference of its choice.*

The Team felt these two positions were supported by the July 31, 1992, decision of the Department in regard to the petition of Carroll Community School District for membership into the Raccoon River Activities Conference (citation omitted). This decision was on the first complaint filed under 281-37 that had gone to hearing before the Director of the Department of Education. ... This decision also contains the following language:

I do not view the chapter 37 procedures as tantamount to an "ask and it shall be given" system whereby a school merely has to establish the fact that it is an independent, has selected its desired conference, and asks me to formalize that preference. I believe that a school must prove initially that it has been "unfairly excluded or denied membership" in a conference. This will not happen if a school, for example, voluntarily secedes from a conference -- perhaps even in protest of my decision to include an independent in its conference through this process -- and then complains of its status as an independent. I believe the initial burden falls on the independent school to show what efforts it has made to seek conference membership including its efforts directed toward more than one conference. The school seeks my intrusion into heretofore local decisions should be prepared to show the hardships it has suffered as a result of its independent status. I do not regard this power lightly.

Id.

In response to the attempt by the Mediation Team, as well as the EIHC, to have this matter dismissed for lack of jurisdiction, Williamsburg pointed out that the pertinent portion of 281 IAC 37 states:

A school or school district that believes it has been unfairly excluded or prevented from obtaining membership in an athletic conference that would provide the opportunity for participation of its students in athletic events or contests with students from other schools or school districts **of comparable size and within reasonable geographic proximity may file a complaint stating this concern with the director of the department of education.**

281 IAC 37.3.

As Williamsburg has pointed out, the plain language of the regulation does not restrict its applicability to so-called independent schools or school districts. No where does it plainly state that a school must be "independent". The regulation clearly applies to any school or school district that has been "unfairly excluded or prevented from obtaining membership in a conference that would provide the opportunity for participation of its students in athletic events or contests **with students from schools of comparable size and within reasonable geographic proximity.** Williamsburg argues that interpreting the regulation to provide that any school in a conference doesn't qualify, ignores the "comparable size" and "reasonable geographic proximity" language.

Although Williamsburg agrees that it would like to increase its opportunities for athletic participation as well as music participation for 7th, 8th, and 9th graders, there are concerns with the varsity program as well. Williamsburg testified that at the last conference meeting held in April 1999, conference schools discussed dropping cross-country and golf as official conference sports. In addition, five SICL conference schools have announced that they will not participate in hosting conference music events due to facility size and lack of interest in music.

Williamsburg does not believe that the desire of the EIHC members to limit conference membership enrollment to 10 schools is a valid reason to reject their petition. EIHC presented evidence that conference athletic directors feel that an 11-school schedule is unmanageable. They also argued that such a situation would have a negative impact on scheduling and gate receipts. One member of the EIHC testified that for the past 35 years he had been an administrator of a school in the EIHC. He stated: "The conference has had a long and prestigious tradition. Since 1964, there have been few changes and those changes that were made have had the support of the entire conference. ... Since 1989, several schools have expressed an interest in becoming members of the EIHC. In each case, we listened to their proposal and after deliberation among the conference board of control, it was felt that we were happy to stay with the current 10 teams." (Testimony of Solon High School Principal, Larry Meister.)

In the "conference-enrollment-class" exhibit presented by the EIHC, there are several conferences listed that have more than 10 members.

Raccoon River Conference	13
North Central	11
Big East	13
Heart of Iowa	12
Corner Conference	11
South Iowa Cedar League (SICL)	12
SEI Super	21
Blue Grass	11
Upper Iowa	13
North Iowa Cedar League	13
Maple Valley	12

The Mediation Team Report:

In spite of expressed reservations about the appropriateness of the mediation process in this case, the mediation team conducted its meeting on May 10, 1999, as directed by the Department of Education. Mr. Bechtel reported that although they were unable to reach a mediated resolution to the complaint, they did spend several hours in getting input and clarification from Williamsburg and the member schools of the IEHC. He stated that Williamsburg provided considerable information and it was reviewed by the team. The mediation team concluded as follows:

There is no dispute that Williamsburg, in enrollment, has outgrown the other schools in the SICL. This disparity will increase in future years. Williamsburg feels its students are disadvantaged by not being able to participate in the breadth of programs available for students in schools of their similar size. The other schools in the SICL do not have student numbers to make such offerings possible. This greatly limits Williamsburg student participation. The district has made attempts over the years to join other conferences but have [sic] not been successful. They feel the EIHC is the most logical conference for them to join in terms of size of schools, programs, and travel distances.

...

The Team did not disagree with the basic fact positions Williamsburg presented on why it was not a "good fit" to stay in the SICL and why membership in the EIHC would provide better and expanded activity programs for its students. **If the Department feels there is no conflict with its current policies on how an independent school is identified in complaints filed under the**

provisions of 281-37, and finds that Williamsburg qualifies as an "involuntary independent" school, then the Team feels the EIHC is a logical conference placement. (Emphasis added.)

(Mediation Team Report, pp. 3-4.)

II. CONCLUSIONS OF LAW

Chapter 37 of the Iowa Administrative Code is a limitation on the freedom of choice that has traditionally been the way conference alliances have been drawn. These rules became effective on December 11, 1991, as a result of legislative concerns that some procedure be put into place that "would guarantee each accredited high school membership in an athletic conference." *In re Petition of Carroll Community School District*, 9 D.o.E. App. Dec. 251, 254(1992). The premise of Chapter 37 is stated as follows:

It is the purpose of this chapter to provide a procedure ensuring that a public school or accredited nonpublic school desiring to be a member of a conference providing extracurricular athletic contests and competitions for students is granted this opportunity. Membership shall be with other schools of comparable size and within reasonable geographic proximity.

281 Iowa Administrative Code 37.1.

The procedure begins with the filing of a complaint by a school board member with the director of education who then schedules a mediation session involving the independent school and representatives of the schools in the desired conference. The director establishes a mediation team comprising the executive director of the Association or designee and the executive secretary of the Girls' Union or designee.

The principles guiding both the Mediation Team and the director of education are stated in the rules:

Membership shall be with other schools of comparable size and within reasonable geographic proximity.

281 IAC 37.1

Factors to be weighed in reaching resolution will include, but not be limited to, school enrollment figures (current and projected), travel distances,

comparability of instructional programs, traditional rivalries, number of existing and proposed schools in the conference, and comparability of athletic programs and other school-sponsored programs.

281 IAC 37.4.

...

[T]he important phase of this process is mediation. In that setting, all evidence, reasoning, and arguments should be made by all parties. If a mediated settlement is not reached, ... great weight [will be placed] on the mediation team's ensuring recommendation, so much so that the burden of persuasion will thereafter be placed at hearing on the school or schools who oppose the recommendation. In the absence of convincing proof that the mediation team failed to consider one or more of the factors laid out in the rules, or was otherwise biased, prejudiced, or predisposed, the mediation team's recommendation will be implemented.

See, In re Petition of Carroll Community School District, supra at 256-258(1992).

There are two issues presented by this appeal. The first is jurisdictional: whether the Director has jurisdiction under chapter 37 to direct the mediation of the Williamsburg petition for placement in a new conference after Williamsburg voluntarily withdrew from its old conference?

If the director does have jurisdiction over Williamsburg's petition, the second issue is: whether the Mediation Team's recommendation should be implemented?

Issue I--Jurisdiction:

The confusion among members of the Team regarding the Director's jurisdiction over this matter stems from a misunderstanding of the legal impact of certain language in the first appeal decided under 281 IAC 37. *In re Petition of Carroll Community School District*, 9 D.o.E. App. Dec. 251(1992) contained the language relied upon by the Team in questioning Williamsburg's eligibility for mediation:

In deciding this case, I wish to take the opportunity to stress what I hold to be a State policy on the issue of conferences and this process.

Id. at 257. In the paragraph following that statement, there are several sentences beginning with "I believe..." or "I do not view...". These statements are not legally binding. In legal jargon, such statements are referred to as "dicta".

Dicta are defined as, "Opinions of the judge which do not embody the resolution or determination of the court." *Black's Law Dictionary 454* (6th ed. 1998). *Dicta*, like the statements referenced above, cannot be the "State policy on the issue of conferences" for two reasons: (1) These statements were not part of the holding of the *Carroll* case because the issue of whether a school had to be "independent" under chapter 37 was not the issue decided by that case. *Carroll* was independent prior to the effective date of the rules; its status was not even addressed. (2) Even if the issue of "independent" vs. "voluntarily independent" had been more germane to the resolution of this case, it would only be "guidance" for future cases. It could not be used to deny Williamsburg's petition unless such a requirement had been promulgated as part of the chapter 37 rules by the State Board of Education.

One of the few Iowa Supreme Court cases that discusses this rule making requirement for State agencies happened to involve the Iowa Department of Education.² *Keeler v. Iowa State Bd. Of Public Instr.*, 331 N.W.2d 110(Iowa 1983). In *Keeler*, the Iowa Supreme Court stated that certain procedural guidelines for school closings could not be enforced against the school district as "rules". Even though the guidelines ("*Barker Guidelines*") had been enunciated in a contested case proceeding, they could not be "policy" -- only recommendations.

In other words, Iowa Code section 17A.4(1999) prohibits a State agency, like the Department of Education, from using a policy to anyone's detriment if it has not been adopted through the rule making process. The rationale for this rule making requirement was more fully explained by the Iowa Supreme Court in *Anderson v. Iowa Dept. of Human Svcs.*, 368 N.W.2d 104(Iowa 1985). In that case, the Court invalidated the use of "guidelines" used by a DHS hearing officer in consideration of a Medicaid appeal. The Court stated:

At most the manual rules appear to be guidelines for the consideration of a claim.

Professor Bonfield cautions against communicating policies affecting the public without following the procedures for rulemaking as follows:

The only caveat is that any final product they [the state agency] adopt which will substantially affect the public or any segment thereof, must be promulgated with all the procedural niceties required for

² Formerly known as the Iowa Department of Public Instruction.

the rules. This is so whether that final product defining law or policy of general applicability is denominated a "memorandum, directive, manual or [any] other communication."

Id. at 108(citing Bonfield, *Administrative Procedures Act*, 60 Iowa L.Rev. 731, 835 (1975)).

In a statement presented to the hearing panel, one of the EIHC representatives wrote:

We feel it would set a dangerous precedent for the Department of Education to assist schools who chose to become independent for the purpose of making themselves eligible to change to a different conference. David Bechtel has noted that in writing the Code himself, this was not the intent.

(Mid-Prairie Comm. Sch. Dist.-- EIHC Exhibits.)

It is not that we disagree with anyone's intent. What is at issue here is how that intent is conveyed to those subject to regulation under chapter 37. Under the Iowa Administrative Procedures Act, intent is established by the plain meaning of the rule, not from what may have been in the mind of the person drafting the rule.

If the members of the Girls' Union and the Boys' Athletic Association want to limit chapter 37 mediation to "independents," such a rule must be proposed for consideration under the State Board's rule making procedures. *Dicta* from appeal decisions that are not readily accessible to the public cannot provide such authority.

Issue 2--Implementation of the Team's Recommendation:

The evidence presented at the hearing on this appeal, as well as the documents presented for consideration by the Mediation Team support the recommendation of the Mediation Team in line with the principles outlined in 281 IAC 37.4. There is no dispute that the EIHC provides Williamsburg with the conference that would provide the opportunity for participation of its students in athletic events or contests **with students from school of comparable size and within reasonable geographic proximity** as provided by 281 IAC 37.3. "In the absence of convincing proof that the mediation team failed to consider one or more of the factors laid out in the rules, or was otherwise biased, prejudiced, or predisposed, the mediation team's recommendation will be implemented." *In re Iowa Lakes Athletic Conference Realignment*, 12 D.o.E. App. Dec. 340, 345(1995).

Any motion or objections not previously ruled upon are hereby denied and overruled.

**III.
DECISION**

After consideration of all the information gathered by the Mediation Team and its recommendations, as well as the oral testimony given at the appeal hearing, it is the decision of the hearing panel and administrative law judge that the recommendations of the Mediation Team are to be followed and should be instituted at once.

DATE

ANN MARIE BRICK, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

DATE

TED STILWILL, DIRECTOR
DEPARTMENT OF EDUCATION