IOWA STATE BOARD
OF EDUCATION
(Cite as 5 D.o.E. App. Dec. 76)

In re JoAnne and Mark Hamilton	:	
JoAnne and Mark Hamilton, Appellants,	:	
v.	:	DECISION
Lakota Consolidated Independent School District, Appellee.	:	[Admin. Doc. #849, 854]

The above-captioned matter came on for hearing May 29, 1986, before a hearing panel consisting of Dr. Robert D. Benton, (then) commissioner of the Department of Public Instruction and presiding officer; Mr. Gayle Obrecht, (then) director, Administration and Finance Division; and Mr. David H. Bechtel, (then) administrative assistant. An evidentiary hearing was conducted pursuant to Iowa Code sections 280.16, 290.3, 17A.11-.17, and departmental rules found at 670 Iowa Administrative Code 51. Appellants were present and represented by Mr. Mark Soldat, attorney, Algona; Appellee was present in the person of (then) Superintendent Kermit Miller and by Counsel Harold White, Fitzgibbons Brothers, Estherville.

Appellants sought review of a decision of the board of directors [hereinafter Board] of Lakota Consolidated Independent School District [hereinafter District] made on April 1, 1986, to the effect that the District is providing instructional programs that would be appropriate for Appellants' two children. An affidavit of appeal from that decision was timely filed on April 21, 1986. Appellants' contested case was consolidated with similar appeals by James and Sheila Junkermeier and Mary Jo and William Lofstrom against the District and heard on May 29, 1986. Briefs were submitted by the parties in June.

I.
Procedural History

In August, 1985, Appellants and others appeared before the Board in an attempt to invoke the remedies available in a newly enacted statute, Iowa Code section 280.16 ("Appropriate Instructional Program Review"). The Board summarily denied their requests, taking the position that as an approved school district meeting minimum standards, its programs were appropriate for all students. Appellants appealed to the (then) State Board of Public Instruction for review as permitted by the statute.

The first appeals under the new law were presented in two days of hearings. The State Board issued a final decision on January 10, 1986. See In re Connie Berg, et al., 4 D.P.I. App. Dec. 150. Relief was granted to eight of eleven children of appellants in those cases. The District was ordered "to provide the appropriate programming for the eight students . . . or to pay the tuition required by the districts in which the students are currently enrolled." Id. at 179.

Appellants herein are the parents of two of the three children for whom the desired relief was not granted in that January 10 decision. As to them, the State Board ordered the District Board to hear the cases anew. "The decision is remanded for the board's individual determinations to be made with respect to . . . Jody and Tara Hamilton, upon evidence submitted to the board." Id.

The Board adopted written procedures (essentially a questionnaire) for hearing any subsequent requests under section 280.16 in late January. Appellants appeared before the Board on several occasions seeking to effect both the remanded hearing ordered by the State Board and a new hearing, believing the remanded hearing would give them a remedy through the first semester of the 1985-86 school year and the new request would provide a remedy for the balance of that school year.

The Board refused to conduct the remanded hearing. Appellants filed a second affidavit of appeal with this department, relying on the language of section 280.16 allowing appeals to the State Board from "omissions" as well as from decisions of local boards. The District then perpetuated its refusal to hear the case by arguing that the filing of an appeal with the State Board ousted the District of jurisdiction. Appellants reluctantly withdrew their appeal, following which the District set a late March board meeting as the date for the presentation of Appellants' cases. Counsel for Appellants, Mr. Soldat, expected or at least hoped that the Board would hear both the remand and the new case at that meeting, but Board attorney Mr. White announced that the Board had no plans to conduct and hear the remanded case, despite the State Board's order to do so and subsequent reaffirmation of that order. See Previous Record, Transcript of March 25 Board meeting, at pages 8-12.

In essence, Appellants have appealed the Board's failure to hear the case on remand as ordered by the State Board as well as the Board's decision made on April 1, 1986, concluding that the District provides appropriate instructional programming for Tara and Jody Hamilton.

II.
Findings of Fact

The hearing panel finds that it and the State Board of Education have jurisdiction over the parties and the subject matter of this appeal.

A. Appellants

Jody Hamilton is in sixth grade this year at Buffalo Center-Rake (BC-R). Tara Hamilton is in third grade there. At the time of hearing, the girls were concluding their fifth and second grades, respectively. Their parents, Appellants Mark and JoAnne Hamilton, reside in the Lakota school district and have paid tuition for their children to attend the BC-R schools since the girls were in kindergarten. The decision to do so was based in part on the Hamilton's belief that their resident district offered a poor quality of education, coupled with their desire to avoid a change of schools resulting from a Lakota reorganization which they saw as imminent. Mark is a farmer, and JoAnne is a registered nurse.

1. Jody Hamilton

Jody is a scholastically and athletically superior young lady. In 1984 she was tested for special academic and creative skills and scored in the top three percent of BC-R students. She was, therefore, accepted into BC-R's Talented and Gifted (TAG) program established and financed according to Iowa Code sections 442.31-.36. The TAG program at BC-R is a "pull-out" program whereby students are actually removed from the regular classroom to another room for specialized instruction designed to meet their needs. Jody also takes private clarinet lessons at BC-R. In her regular physical education class there, she is taught more than twenty different athletic activities or sports, including gymnastics for which she has a particular affinity. She is in a class of approximately 28 sixth grade students at BC-R and is at this point college bound.

2. Tara Hamilton

Tara, too, has been accepted into BC-R's Talented and Gifted program. One of her identified areas of talent is creative writing. At BC-R, she is in a class of approximately twenty-two students. Tara has develped an enthusiasm for music, even to the point of overcoming her shyness to sing a solo last year as a second-grader. She has also begun piano lessons within the past year.

At BC-R, Tara is exposed to "computer music" (Casio synthesizer) and Spanish, in addition to the extra challenge she is given by virtue of her participation in the TAG program. In her physical education class, her athletic needs are being met through the introduction of non-contact sports and activities. Buffalo Center-Rake has a sequential learning program for math, social studies, and language arts, with curricular vertical articulation K-12.

B. Appellee -- Lakota Consolidated Independent School District

The District has a current enrollment of approximately 98 students in grades K-12, housed in one building. At the time of the hearing, Mr. Kermit Miller was superintendent and elementary and secondary principal. He has since resigned, as has his wife who taught second grade in the District. Mr. Miller testified at this hearing and the 1985 hearing that the District has made a cognitive decision not to offer a special talented and/or gifted program and not to seek the additional funding available for such a program. Instead, the District offers "enrichment" activities which he characterized as individualized extra assignments. When pressed for details, Mr. Miller could only point to the fact that bulletin boards in the classroom and library display additional activities for students to undertake once they have completed the regular assignment. No teacher on the District staff has had experience or training in operating a talented and gifted program. How bright or highly motivated children are challenged is left to the individual classroom teacher. Mr. Miller suggested that the programming answer for those children would lie in the assignment of additional coursework. At the senior high level, Mr. Miller entrusts the counselor with the duty of recommending challenging or stimulating courses to students with special abilities.

Mrs. Miller, the superintendent's wife and (then) second-grade teacher, confirmed Mr. Miller's testimony with regard to enrichment activities, although she called the bulletin boards "learning centers." There are as many as "thirty different learning centers in the classroom" at any given time, in addition to those in the library. Under the Individually Guided Education program, she testified, there may be up to four or five groups of like ability children per classroom. However, classes average about seven students; four or five groups would then have 1.4-1.75 students in them. Those "groups" presumably work at different levels according to their test scores and abilities.

Mrs. Miller also stated that the District sponsored contests for elementary students for story writing, poetry, and art and awarded prizes for achievement. With respect to computer instruction, she stated at the Board hearing that in her class of eight second-grade students, each child received twenty minutes of individual time at the computer every two weeks. Apparently the same amount of instruction is available for students in other grades as well. There is no computer music program, and one person teaches both vocal and instrumental music for all grades, K-12.

Evidence was also taken on the physical education program at the District. Mr. Donald Peterson has served as the district's physical education teacher for the past twenty-eight years. See, Appellant's Exhibit 6; In re Connie Berg, et al., 4 D.P.I. App. Dec. at 161. At the time of this hearing, he did not have an approval for physical education, but did hold a coaching authorization. He lacked certification for elementary teaching altogether. Id. Beginning in October of 1985, after the issue came to the foreground as a result of the first appeal, the District hired Mr. Frederick Kadow, who is properly certificated, endorsed, and approved for physical education, to serve as a substitute teacher for Mr. Peterson. Superintendent Miller testified that Mr. Kadow performed substitute duties for other teachers as well during the 1985-86 school year, but that Mr. Kadow was the physical education teacher for the District last year. This entailed two half-days per week.

However, Mrs. Cherrice Ehrich testified on behalf of Appellant that she visited the physical education class on three separate occasions between December, 1985 and February, 1986, and at no time was Mr. Kadow present. Mr. Peterson was there performing instructional duties. Mrs. Ehrich's daughter told her that since Mr. Peterson could not, under departmental approval standards, teach physical education, the class was being called "basketball practice" instead.

Received into evidence were copies of checks written to Mr. Kadow for his services. See Exhibits 4, 7, and 12. However, due to the fact that he also substituted for other teachers in the system, it is not possible to determine what portion of his pay, if any, is attributed to his work in the physical education department.

Appellants have asked that the hearing panel and State Board take official notice of our previous decision, In re Connie Berg, et al., as well as facts found therein with respect to the District. We do so, and add to those facts the following evidence submitted to the Board below and to this hearing panel.

Results on the Iowa Tests of Basic Skills (ITBS) for the scholastic year 1985-86, reveal that eight second graders, the class of which Tara Hamilton would be a part if she were attending in the District, tested at equally impressive levels as the second grade at BC-R. That is, the students' composite scores placed them in the eighty-first percentile rank of Iowa pupil norms and the ninety-ninth percentile rank of Iowa school norms.

Last year's fifth grade ITBS scores for the District (Jody's class, if she attended there) are not as impressive: the six students taking the test in February, 1986, placed in the twenty-eighth percentile rank of Iowa pupil norms and the first percentile rank of Iowa school norms. The fifth grade at BC-R where Judy currently is enrolled is at the seventy-second percentile (Iowa school norms). The difference in fifth grade performance between the two schools is not insignificant. Compare Appellants' Exhibit 15 (BC-R), and Appellants' Exhibit 1 (Lakota).

In looking at the scores as a whole, it appears that student performance is higher for some grades in the District than it had been in previous years. In other grades, the opposite is true. The fourth grade class we cited in the first decision last year has improved somewhat from the twenty-second percentile in 1984-85 to the twenty-eighth percentile, as noted above, for the 1985-86 school year.

We also received evidence, presumably intended to contradict or explain away our findings and conclusions with respect to test data in the original decision, Berg, et al., 4 D.P.I. App. Dec. at 162-63, 175-76. Appellee's Exhibit 12 from the hearing below is a two-paragraph statement unsigned and unattributed to any author. It declares that the State Board's finding that the kindergarteners' test scores declined from the eighty-seventh percentile rank to the twenty-second percentile rank by fourth grade overlooked the fact that three of the kindergarten students tested in the 1980-81 school year had moved by the fourth grade and were replaced by three learning disabled students who scored twenty-two, forty-two, and eighty-eight percentile ranks lower than their counterparts.

Although the first case has long since been closed (and this evidence was not brought forth or questioned at the limited Rehearing, see In re Connie Berg, et al., 4 D.P.I. App. Dec. 179A), this evidence reveals the District's attempt to quibble with the State Board's findings and conclusions. That class was cited as an example of the trend apparent in the test scores of the District's students; the point was illustrated that the scores declined over a five year period. We acknowledged that "many factors influence such test data," 4 D.P.I. App. Dec. at 163, and were not necessarily focusing on the scores themselves. Moreover, our reference to test scores was in response to evidence presented and was only relied upon to the extent that it lent credence to the appellants' contention that student performance declined as a result of a Lakota education.

We also find that the District's "enrichment program," offered here as an alternative to a talented and gifted program, is not a program designed to reach identified students whose talents and abilities require special attention. Comparing Lakota's enrichment activities to those at issue in a similar case illustrates the lack of program specificity and

organization characteristic of a true enrichment program. See In re Dennis Bush, 4 D.P.I. App. Dec. 197, 198-99, 201-03. Therefore, not only does the District not offer a TAG program, but the alternative the Board suggests it has or is capable of developing is also insufficient to meet the needs of students formally identified as talented and/or gifted.

Finally, we note that at the time of this hearing, Donald Peterson was still certificated for teaching physical education. If he has been rehired without having received a temporary certificate, the district obviously has not taken seriously our findings of January, 1986. Superintendent Miller admitted that there have been no changes made in the curricular program since last September when we first heard appeals against the District.

III.
Conclusions of Law

The statute which serves as the basis for this appeal reads as follows:

> **Appropriate Instructional Program Review.**
>
> Pursuant to the procedures established in chapter 290, a student's parent or guardian may obtain a review of an action or omission of the board of directors of the district of residence of the student on either of the following grounds:
>
> 1. That the student has been or is about to be denied entry or continuance in an instructional program appropriate for that student.
>
> 2. That the student has been or is about to be required to enter or continue in an instructional program that is inappropriate for that student.
>
> If the state board of public instruction finds that a student has been denied an appropriate instructional program, or required to enter an inappropriate instructional program, the state board shall order the resident district to provide or make provision for an appropriate instructional program for that student.

Iowa Code § 280.16 (Interim Supp. 1985).

In our first decision interpreting the statute, we reached some conclusions about what we believe this law was designed to accomplish. See In re Connie Berg, et al., 4 D.P.I. App. Dec. 150, 168-174. We have not deviated from those conclusions in subsequent cases. Therefore, the standard we apply is appropriateness for the individual student's needs

and abilities, vis a vis the instructional program or curriculum offered by the appellee school district. Id. at 168; In re Clarence Anderson, 4 D.P.I. App. Dec. 208, 214.

A. Procedure Below

The District contends it refused to conduct new or remanded hearings in January and February, 1986, because the Board wanted time to devise procedures for processing requests under section 280.16. Eventually the Board created a packet of forms to be completed by a parent making a request, but no procedures were adopted. The information to be supplied includes the parents' name and address, the child's name, what school the child attends, the reasons for believing Lakota's instructional programs to be inappropriate, a summary of witnesses and testimony expected to be presented, copies of documents relied upon, and the relief requested. The parents are then notified of the date of the board meeting when the issue will be addressed.

In this case, the Board met on March 25. A court reporter was hired to record and transcribe the proceedings. Superintendent Kermit Miller assumed the role of "defense attorney," placing his evidence before the Board, calling witnesses, and cross-examining Appellants and their witnesses. Attorney Harold White was present to represent the Board. Board President Ed Droessler presided.

The entire meeting was a clumsy attempt to engage in court-like proceedings; everyone was confused. Superintendent Miller called his wife as a witness before Appellants had completed the presentation of their evidence and testimony. Questions were propounded out of order; Mr. Miller "testified" during questioning of his witnesses and cross-examination of other witnesses; Mr. Soldat objected to the introduction of evidence neither he nor Appellants had seen prior to that evening. The result was chaos, as it often is when lay people try to conduct a trial. This procedure, while it may have been a good faith attempt by the Board to be neutral and fair, created more problems than it ameliorated.

We see no reason why a school board meeting should be turned into a courtroom proceeding. Every decision made by a local school board is appealable to the state board of education under Iowa Code chapter 290. No special ceremony needs to be invoked for these requests. No statute requires that a court reporter be present or a verbatim transcript be made of 280.16-type requests. Even Iowa Code section 290.2, requiring the board to furnish "a complete certified transcript of the record and proceedings related to the decision appealed from" has not been interpreted to require a mechanical or electronic recording of a board meeting with attendant transcript thereof. See, e.g., In re Connie Berg, et al., 4 D.P.I. App. Dec. at 167-68.

In addition, a proceeding such as the one held by the Board in this case creates an aura of legality such that a board may be tempted to turn to counsel for guidance, potentially resulting in a decision by counsel rather than one by the local board. We are disturbed at the nature of the "advice" rendered by Board Attorney Harold White in this case. There is nothing in the record before us to show that the Board met following the

hearing on March 25, or between that date and April 1 when the Board reconvened to make its decisions.[1] Yet Appellants' Exhibit 3, an unofficial transcript of the April 1 Board meeting, shows that Mr. White addressed the Board and provided the directors with his proposed findings and conclusions with respect to each individual child.

> White: I'll tell you what I basically did. We had to, uh, under board policy, to make a decision and study, most of them are a couple pages. We have a written transcript of several appeals and the transcript shows everything that was said. What I tried to do is hit the high points. All of these findings, this is what I am proposing, is that all of the requests be denied, each one of them.

Appellants' Exhibit 3 at p. 1 (emphasis added). Mr White made other statements that evening leading us to believe the decisions were being proposed by him without prior input from the Board. See, e.g., id. at p. 6. (White: "Now maybe you won't agree with me; those are my own feelings, but what I felt."), p. 7. (White: "That's why I handled this one differently."), p. 20. ([White explaining parliamentary procedure] "Motion is to approve the proposed decision. I think we already approved the decision." (Emphasis added.) In fact, no motion had been made and none of the previous statements made by Board members indicated final acceptance of White's proposed decisions.)

Moreover, Mr. White admonished, mandated, or advised the Board: "You must be unanimous." Id. at p. 21. We have been able to ascertain no authority, statutory or otherwise, to support the notion that this or any other board decision must be unanimous. And except for creating the appearance of a "united front," we can think of no justification for taking such a stand.

Knowing how much the Board has relied on its attorney throughout the past year or so, statements and actions such as those noted above create an inference that Mr. White is perhaps exceeding his role as advisor and assuming a role of decision maker. While it is true that a discussion of each child took place, the nature of those discussions was Mr. White's explanation and defense of his "proposed decisions." In the end, the Board voted 5-0 to adopt Mr. White's finding and conclusions as its own.

Perhaps Mr. White suggested that the Board follow a proceeding similar to our contested case proceedings; that is, the State Board delegates the hearing and proposed decision to the director and a hearing panel, later

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[1] Either the Board met to decide the cases between the time testimony was taken and April 1, and we were given no record of the meeting, the Board met in that period of time in violation of the open meetings law, or Mr. White alone reviewed the evidence and proposed a decision.

approving the proposed decision or ordering a rehearing. However, our procedures are in rule form giving notice to interested parties of what to expect and were adopted pursuant to specific statutory authority. See Iowa Code §§ 17A.15(2), 290.5 (1985), and departmental rules found at 670 Iowa Admin. Code 51. It is highly doubtful that similar authority exists for a school board to delegate its fact finding or decision making to counsel. While we do not question the fact that, in general, counsel advise clients, there exists a distinction between traditional legal advice (wording of policies, resolutions, and the like) and advice that takes the form of rendering an educational decision prior to or in the absence of board discussion. It is fundamental that the elected body should be the entity evaluating the evidence and making the decisions.

It is interesting to note that Director Lyle Mabus pointed out during the discussion on April 1 that Mr. White had not mentioned the talented and gifted needs of any of the pupils, specifically Jody and Tara Hamilton.

> Mabus: You didn't address the talented and gifted program.
>
> White: The reason I didn't do that is because it isn't required.

Appellants' Exhibit 3 at p. 15. A discussion ensued regarding the definition of talented and gifted children, the state law authorizing funds for such a program, and the philosophical reasons against offering such a program. Mr. Mabus did not pursue his concern.

Perhaps as a result of the confusing process, the District has invited us to provide guidance to them, and all other districts, by establishing procedures to be issued by local school boards for processing requests under Iowa Code section 280.16. Our recommendations, not rules, with respect to board procedure for dealing with such requests follow. Initially, we wish to make clear that a board need not adopt a "mock trial" approach to a parental request for relief under Iowa Code section 280.16. Nor is a mechanical or electronic recording of the board meeting at which evidence was taken or a decision made required. Boards, of course, may arrange for formal recording if they wish. The following procedures would seem reasonable:

(1) The parent or guardian of a resident student should be given a full opportunity to speak to and provide documentation of the needs and abilities of the student(s) for whom relief is requested. Student records should be supplied.

(2) The parent or guardian should state what form of relief is sought. For example, the parent should specify whether the addition of a specific course or courses would render the instructional program appropriate, or whether the sharing or sending of a student to a neighboring district for a

particular course or program would satisfy the student's needs, or whether in the parents' estimation the student should be fully tuitioned to a neighboring district to receive an appropriate instructional program. The board is not bound by the parents' requested relief, however.

(3) The administration or its representative should be allowed to be heard on behalf of the district, stating what curricular programs are available to satisfy the student's needs as presented by the parent or guardian. If a new program or course could be implemented in a short time, this should also be considered by the board.

(4) If the district requires by rule that parents provide advance notice of what documents and witnesses will be introduced at the board meeting, fairness principles dictate that the district should reciprocate by providing similar information to the parents or guardians equally in advance of the board meeting.

(5) Prudent decision making techniques should be applied by the board. Where necessary, the directors should be given copies of all relevant documents in order to study them individually and discuss them as a group prior to voting. Board minutes should reflect issues discussed.

(6) A roll call vote should be taken in open public meeting following discussion.

(7) Decisions should be made by board members on the basis of the individual student's instructional needs and abilities. A written decision should be provided to the requesting parents or guardian stating what the board factually found the student's needs and abilities to be, what curricular offerings are being or will soon be provided by the district to meet those needs, if any, and a conclusion appropriate to those findings of fact.

Our previous decisions stand as precedent to guide local boards in reaching substantive decisions of this kind. Not at issue under section 280.16 is the provision of special education or extra-curricular activities. See In re Dennis Bush, 4 D.P.I. App. Dec. 197, 204; In re Clarence Anderson, 4 D.P.I. App. Dec. 208, 213.

B. Scope of Review

Over objections by the District, evidence was received in this case that was not presented to the Board at its March 25 meeting. At issue is

the question whether the State Board has the express or implied authority to receive evidence not offered or received by the local board in appeals of section 280.16 cases. Both parties briefed the issue and, not surprisingly, disagree.

Appellee cited Albrecht v. Independent School District of Fairbank, 216 Iowa 968, 250 N.W. 129 (1933) for the proposition that the State Board's jurisdiction in 280.16 cases is appellate rather than original. Extended, that principle would mean that the State Board would be bound by the factual findings of the Lakota Board and could not receive evidence or testimony not heard or received below. In essence, our review of local board decisions would be confined to a reading of the record and an examination on errors assigned. The District apparently has taken the approach that the State Board's hearing process under chapter 290 is akin to judicial review. See Iowa Code § 17A.19 (1985).

In contrast, the language of section 280.16 gives a substantive cause of action to the parent or guardian of a resident student. The statute incorporates the procedures of Chapter 290 and rules adopted thereunder. Iowa Code § 280.16 (Interim Supp. 1985). The plain language of the statute allows the parent or guardian to "obtain a review of an action or omission" of the local board on either of two grounds. Id. (Emphasis added.) It would be impossible, under the District's argument, to grant relief (or to "find" inappropriateness of program, id.) in the instance where the local board failed to take action ("omission") because there would be no record to review.

Furthermore, the duty given to the State Board in all chapter 290 appeals, including section 280.16 "reviews" by express incorporation, is to make "a just and equitable" decision. Iowa Code § 290.3 (1985). It is clear from the statutory language of sections 290.3 and 290.4 that a full evidentiary hearing may be taken from any board decision.

In addition, our rules of procedure allow for three types of hearings: an evidentiary hearing, an "on-the-record" hearing, and a hybrid of the two. 670 Iowa Admin. Code 51.6. There would be no need for an evidentiary hearing or the hybrid if all we were capable of reviewing was the existing record and decision made by the local board.

Moreover, the legislature provided for a due process appeal process from local board decisions, arguably because the local board may not be impartial when a question or appeal is raised based on district rules, policies, procedures, programs, or decisions. An appearance before the State Board or its hearing panel is an opportunity to challenge local decisions before a disinterested tribunal.

Finally, the Albrecht case relied on by the District antedated section 280.16 by fifty-three years, and involved a very different factual circumstance. It can thus be distinguished. In that case, the State Superintendent, in an appeal from the county superintendent's affirmance of a local board decision, ordered the district to provide transportation for students living more than two miles from the new school site. However, the provision of transportation was not an issue in the appeal from a decision about the location of the new school. Albrecht v. Independent School District of Fairbank, 216 Iowa 968, 972, 250 N.W. 129, ___ (1933). In effect, the action taken by the State Superintendent exceeded his authority on appeal.

Supportive of the distinction between that case's holding and the general power of decision making conferred (now) on the State Board of Education is the court's conclusion in Atkinson v. Hutchins, 68 Iowa 161, 26 N.W. 54, 55 (1885) ("We see no reason why the state superintendent should be confined to the exact record made before the county superintendent." . . . "The hearing upon appeal should, we think, be regarded as a hearing de novo, and be based upon all essential existing facts.") Accord, 1912 O.A.G. 642; 1930 O.A.G. 132. Also, we have stated in previous contested cases that the scope of review in our hearing process is de novo. Arbore v. Cedar Rapids Community School District, 1 D.P.I. App. Dec. 74; In re Steven and Lynette Delagardelle, 3 D.P.I. App. Dec. 220; In re Henderson and Reinking, 5 D.o.E. App. Dec. 39.

In the case before us, counsel for the parties corresponded prior to the hearing in an attempt to stipulate to facts and issues, leading to an on-the-record hearing. See Appellee's Exhibits A-E. No accord was reached, however, and no single written instrument evidenced the stipulation of the parties as required by rule. See 670 Iowa Admin. Code 51.6(1). The parties then verbally agreed that the transcript of the March 25 Board meeting and its attendant exhibits would serve as the previous record, and a mixed evidentiary and on-the-record hearing was elected before the hearing panel.

Appellants wanted the opportunity to contest the Board's exhibits at this level because neither counsel for Appellants nor Appellants themselves were given copies of the exhibits relied upon by the Board prior to the March 25 meeting. Additional evidence was offered by Appellants here, both expounding upon evidence introduced below and rebutting evidence offered by the District below.

The types of evidence objected to by the District (on the ground that the evidence was not before the Board when it reached its decision) included the documents of which the State Board took official notice in the January, 1986 decision (clearly referred to in the board meeting below); a September 25, 1985 letter from District Superintendent Miller to the parents of fifth and sixth grade students (obviously within the knowledge of the Board at the time of its decison); (statements and cancelled checks regarding the pay of substitute teacher Frederick Kadow) (clearly within the knowledge of the Board at the time of its decision); and 1985-86 ITBS composite scores of Lakota students. (Although these results were apparently not available on March 25, they are clearly relevant; see Iowa Code § 17A.14(1); our conclusion that the hearing panel and State Board are not confined to the record below is dispositive of this objection.)

The issue of the scope of review being decided against the District, we will proceed to examine the merits of the appeals before us.

C. Jody Hamilton

We have found as fact that Jody Hamilton, now in sixth grade in BC-R, is established in a talented and gifted program there and has been since the 1985-86 school year. We also found that the District offers no TAG

program and its "enrichment" activities fall short of meeting the needs of Jody Hamilton. Accordingly, we conclude that Lakota's instructional program would be inappropriate for Jody.

The District, in its April 1 written decision, did not find that Jody Hamilton was a talented or gifted student, despite valid evidence on the issue.[2] In fact, its sole finding of fact was that Jody had never attended the District. The next sentence of the decision, purporting to be a finding of fact, was instead a conclusion without support in the record:

> The Board finds that if Jody Hamilton were to attend Lakota for the fifth grade, that the instruction offered by Lakota would be appropriate for her and would not be inappropriate.

The final statement totally ignored Jody's status as a talented and gifted student:

> Lakota offers the standard fifth grade program, including instruction in instrumental and vocal music. She would also have the opportunity to participate in numerous athletic activities.

(Board decision, April 1, 1986, at p. 2)(emphasis added).

Avoiding or neglecting to mention that Jody is a student identified as talented and gifted does not change her status. It is unfortunate that Director Mabus did not push counsel to justify this omission from the Board's findings and conclusions. Mr. White's response to Mr. Mabus when asked why he didn't address Jody's TAG status ("The reason I didn't do that is because it isn't required.") is perhaps indicative of the truth of the charge made by Appellants: that this school district cares only about maintaining minimum standards. We so concluded in In re Connie Berg, where we said at page 177, ". . . Appellee's priority has been to stay alive, to do only what was necessary to maintain approval status--not what was necessary to properly educate its resident students." Apparently nothing has changed.

Jody Hamilton needs more than "the standard fifth grade program." Although a talented and gifted program is not required by statute, the State Board has previously concluded that Iowa Code section 280.16 may enable parents of gifted or talented children to receive the extra attention children with exceptional abilities should have, at least until such time as every school must offer or make available a talented and gifted program. See In re Dennis Bush, 4 D.P.I. App. Dec. 197 (Nathan Bush). See also 1986 Iowa Legislative Service No. 8, § 1416, S.F. 2175, p. 400 (West). ("Pursuant to section 256.7, sub-section 5, the state

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[2] This is a vivid example of the necessity for a de novo review of the contested case. If we were confined to the findings of fact made by the Board, we would not have known about Jody's scholastic gifts.

board [of education] shall adopt rules requiring all approved teacher training institutions to include in the professional education program, preparation that contributes to the education of the handicapped and the gifted and talented, which must be successfully completed before graduation from the teacher training program." (Emphasis added.))

D. Tara Hamilton

Now a third grade student at Buffalo Center-Rake, Tara Hamilton has also been identified as talented and gifted, albeit only since spring of 1986, and is receiving appropriate TAG instruction there. The District's lack of organized special programming to meet the needs of exceptional students renders its instructional programs inappropriate for Tara.

In addition, the provision of introductory foreign language at BC-R for elementary students of Tara's abilities is appropriate for her. The loss of such a program, once begun, would be detrimental.

Further, if Mr. Donald Peterson has again been hired to teach K-12 physical education at Lakota, and has still not completed the educational requirements necessary for certification as a K-12 physical education teacher, Tara's physical education program would be per se inappropriate for her.

E. The "Remand" Case and the "New" Case

Needless to say, we are disappointed that the District chose to ignore our order to hear the remanded cases with respect to Jody and Tara Hamilton. We ordered the remand last year for two reasons. First, the District had not examined the needs and abilities of each individual child whose parents were requesting appropriate programming, and we wanted to give them that opportunity. Second, the Hamiltons testified very late in the evening on the first day of the hearing in this case; the members of the hearing panel were exhausted, the witnesses and their counsel were exhausted, and no one knew what evidence would be needed to obtain relief or what standard of inappropriateness would be applied. The Hamiltons' testimony centered on problems with the District, but no concrete evidence about Jody and Tara was introduced to illustrate their needs. In reviewing the evidence and testimony after the close of the hearing, the lack of evidence became apparent for the first time. The hearing panel and State Board concluded that the absence of testimony on the girls' abilities was due more to the lateness of the hour and the focus of testimony on the District than to a valid absence of legitimate reasons for the inappropriateness of program. Therefore, we ordered the remand. It was never carried out.

The statutory language of Iowa Code section 280.16 allows the State Board to make a finding in the case of an "omission" of a local board as well as from a decision. Iowa Code § 280.16 (Interim Supp. 1985). Therefore, we conclude that sufficient evidence exists to support our conclusion that the District's programs were inappropriate for Jody Hamilton in the school year 1985-86 due to the District's lack of a

talented and gifted program during that time. We also find that the District's instructional programs will be inappropriate for Tara Hamiton beginning with the 1986-87 school year due to the lack of a talented and gifted program or a meaningful, organized enrichment program.

IV.
Decision

Having found that the District's instructional programs are inappropriate for Jody Hamilton and have been inappropriate since the August, 1985 decision of the Board, we order the District to reimburse Appellants for the tuition paid by Jody's parents to the Buffalo Center-Rake Community School District for the school year 1985-86 and that paid for this school year 1986-87, if any. Appellants will provide receipts or otherwise show the District the amount expended for tuition purposes.

From the date on which this decision becomes final, the District has the option of providing an appropriate program for Jody in 1986-87 by immediately correcting the deficiencies identified in its programming with respect to Jody Hamilton's needs and then giving evidence of that to this department, or by entering into a sharing agreement with BC-R to provide the appropriate programs for Jody this year, or by paying the maximum tuition for Jody to attend Buffalo Center-Rake as a non-resident student. A decision shall be reached and implemented within a month from the date this decision is approved by the State Board. This order shall continue in force until the District provides the appropriate programming for Jody Hamilton.

From the date on which the decision becomes final, the District has the same options and time frame for providing appropriate programs for Tara Hamilton as stated above for Jody Hamilton. Regardless of which alterntive is chosen for prospectively complying with this order, any amounts expended by Appellants in school year 1986-87 shall be reimbursed by the District. Receipts or cancelled checks are to be provided. This order shall continue in force until the District provides the appropriate programs for Tara Hamilton.

All motions or objections not previously ruled upon are hereby denied and overruled. Costs of this appeal under Chapter 290, if any, are hereby assigned to Appellee District.

October 10, 1986
DATE

Lucas J. DeKoster
LUCAS J. DEKOSTER, PRESIDENT
STATE BOARD OF EDUCATION

October 10, 1986
DATE

Robert D. Benton
ROBERT D. BENTON, Ed.D.
DIRECTOR, DEPARTMENT OF EDUCATION
AND PRESIDING OFFICER