IOWA STATE BOARD OF
PUBLIC INSTRUCTION

(Cite as 4 D.P.I. App. Dec.206)

In re Melva E. Miller	:	
	:	
Melva E. Miller, Appellant	:	DECISION
v.	:	
Meriden-Cleghorn Community School District, Appellee	:	[Admin. Doc. 823]

The above-captioned matter was heard on September 27, 1985, before a hearing panel consisting of Dr. Robert Benton, commissioner of public instruction and presiding officer; Dr. Carol Bradley, administrative consultant; and Mr. David Bechtel, administrative assistant. The evidentiary hearing was held pursuant to Iowa Code section 280.16 (Interim Supp. 1985); Iowa Code chapter 290; and departmental rules found in chapter 670--51, Iowa Administrative Code. Appellant was present but not represented by counsel. Appellee was present in the persons of Superintendent Leland Anderson, Board Secretary Naomi Kintigh, and Robert Byers, elementary principal and counselor. Appellee was represented by Counsel Steven Avery of Cornwall, Avery, Bjornstad & Scott, Spencer, Iowa.

Appellant sought review of a decision by Appellee's board of directors (hereinafter board), denying her request to have that district pay tuition for Appellant's daughter to attend school in the Marcus district for Appellee's alleged denial of appropriate instructional programs for Appellant's daughter. Appellant's hearing was conducted in conjunction with four other parents' appeals, all from similar decisions by Appellee's board.

I.
Findings of Jurisdictional Facts

Appellee moved to dismiss this appeal and others heard at the same time for lack of jurisdiction in that Iowa Code section 280.16, the purported basis of this appeal, has a standing requirement that has not been met in this case. That section reads in pertinent part as follows:

> 280.16 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 <u>of the district of residence of the student</u> on either of the following grounds:

Iowa Code § 280.16 (Interim Supp. 1985) (emphasis added).

The presiding officer issued an order in response to Appellee's motion, which read as follows:

> The Hearing Officer has before him Appellee's Motion to Dismiss. . . . Because [it] raises jurisdictional questions which are to be properly resolved prior to proceeding to the merits of the case, no order shall ensue until evidence has been taken on the issue of jurisdiction.

Mrs. Miller testified that her husband lives in Cleghorn and she resides in Marcus. Under cross-examination, Mrs. Miller admitted that the subject of this appeal, her daughter M. Ester Miller, lives with her in Marcus and is a resident of Marcus.

Such an admission removes any doubt about standing in this case; the Meriden-Cleghorn district is not the "district of residence of the student." The record was devoid of other facts which are relevant to a determination of residency for school purposes. Thus, the two-part review referred to in Mt. Hope School District v. Hendrickson, 197 Iowa 191, 197 N.W. 47 (1924) cannot be applied here. Cf. Berg, et al. v. Lakota Consolidated Independent School District, 4 D.P.I. App. Dec. 150 at 164-167; Anderson v. Meriden-Cleghorn Community School District, 4 D.P.I. App. Dec. 180 at 193-94.

We find ourselves without jurisdiction in this case and must grant Appellee's Motion to Dismiss.

II.
Decision

Appellants Motion to Dismiss is hereby granted. Costs of this appeal, if any under Chapter 290, are assigned to Appellant.

February 13, 1986
DATE

LUCAS J. DEKOSTER, PRESIDENT
STATE BOARD OF PUBLIC INSTRUCTION

February 3, 1986
DATE

ROBERT D. BENTON, Ed.D.
COMMISSIONER OF PUBLIC INSTRUCTION
AND PRESIDING OFFICER

IOWA STATE BOARD OF
PUBLIC INSTRUCTION

(Cite as 4 D.P.I. App. Dec. 208)

In re Clarence Anderson	:	
Clarence Anderson, Appellant	:	
v.	:	DECISION
Meriden-Cleghorn Community School District, Appellee	:	[Admin. Doc. 824]

The above-captioned matter was heard on September 27, 1985, before a hearing panel consisting of Dr. Robert Benton, commissioner of public instruction and presiding officer; Dr. Carol Bradley, administrative consultant; and Mr. David Bechtel, administrative assistant. The evidentiary hearing was held pursuant to Iowa Code section 280.16 (Interim Supp. 1985); Iowa Code chapter 290; and Departmental Rules found in Iowa Administrative Code chapter 670--51. Appellant was present and not represented by counsel. Appellee was present in the persons of Superintendent Leland A. Anderson, Board Secretary Naomi Kintigh, and Robert Byers, elementary principal and counselor. Appellee was represented by Counsel Steven Avery of Cornwall, Avery, Bjornstad & Scott, Spencer, Iowa.

Appellant sought review of a decision of Appellee's board of directors (hereinafter board) denying his request to have his three children tuitioned to the Marcus School District at Meriden-Cleghorn District expense for alleged denial of "appropriate instructional programming." His case was heard on the same day as four other parents' appeals, also taken from decisions of the Meriden-Cleghorn board.

I.
Findings of Fact

The Hearing Panel finds that it and the State Board of Public Instruction have jurisdiction over the parties and the subject matter.

Appellant Clarence Anderson and his wife Koreen are the parents of three school-aged children: Craig, a sixteen year-old junior; Cheri, a fifteen year-old sophomore; and Cathy, an eight year old third grader. All three children have attended the Marcus Community Schools since the fall of 1982, the oldest two having previously been enrolled in Appellee district. The change of school systems came about because of Appellant's dissatisfaction with the educational system of his district. As the Anderson farm is located in the Meriden-Cleghorn (M-C) district, they chose to establish guardianships of the children with grandparents in the

Marcus district for the 1982-83 school year, admittedly to avoid the payment of tuition required for non-residents under Iowa Code section 282.1. Advised in the fall of the 1983-84 school year by Marcus officials that the guardianship arrangement would not satisfy the residency requirement, Koreen Anderson purchased a home in the Marcus District. All three children reside with Koreen in Marcus "six to seven days a week" (Appellant's Exhibit B) for nine months a year while Appellant resides on the farm in Cleghorn. The entire family spends summers together on Appellant's farm. The new arrangement satisfied Marcus officials who have not charged the Andersons tuition for their children's education.

In Appellant's presentation at the July 8 and August 12 meetings, he made reference to the new statute which serves as the basis of his appeal. The statute is entitled "Appropriate Instructional Program Review" and is codified at Iowa Code section 280.16 (Interim Supp. 1985). In his presentation before the M-C board of directors, Appellant made the following statement to outline the inappropriateness of the M-C district for his children:

> I am here to request that my three children be allowed to reside with me at my Cleghorn residence and attend school in Marcus with tuition to be paid by the Meriden-Cleghorn School district.
>
> With the small size of the high school and Jr. high enrollment an appropriate education is not being given in the MC system. I feel I can speak from first hand experience having had my children in both school districts. I can therefore see several advantages the Marcus system has in providing a better quality education for my children over the MC system.
>
> Some of these are as follows: My youngest daughter has been in a TAG program the past two years at Marcus, not available at MC.
>
> My oldest daughter had problems in reading while at MC and was in the learning disabilities program here. Having a son one year advanced, I saw problems with your Jr. high program and it became apparent to me that my daughter was not going to get the help she needed.
>
> We then began attending Marcus where my daughter continued in the learning disabilities program. My daughter has just finished her freshman year and is doing very well, her test scores have gradually improved and is now a solid A and B student.
>
> The music program at Marcus is by far superior to yours at MC. Our entire family is much involved in music.
>
> My son has shown an interest in entering the field of music for a vocation. The good ratings and awards that the Marcus music department receives speaks for itself and does much to foster the interest of future musicians.

> Other areas I find missing or lacking in numbers to carry on a quality program are: the fine arts, wrestling, golf, science facilities and instructors assuming more responsibility than is physically possible to create a good learning atmosphere.
>
> I fully realize Meriden-Cleghorn meets the state's minimum standards. I feel we have passed up opportunities the past several years to upgrade the quality of education here at MC.
>
> I will be happy to discuss any of these issues with you in more detail at this time.

Previous Record at pps. 8-9.

In his testimony before the Hearing Panel, Appellant expounded on his concerns for his children. Cheri, we were told, experienced reading difficulties through the sixth grade (1981-82) at M-C, at that time qualifying for a learning disabilities program. The decision to change schools was made then because "the seventh and eighth grade educational programs are structured as those in the High School." Exhibit B at p. 4. We were not told what that structure was, only that Appellant does not approve of it and could not find support for that structure among local educators. Id.

Cheri improved her grades in seventh grade after the transfer to Marcus. It was determined that she no longer needed the special assistance offered through seventh grade at Marcus and is now a "solid A and B" student.

Appellant did not discuss Craig's abilities or needs other than to say he is a good student, having very few problems in school, and his grades improved when he transferred from M-C to Marcus. He has a strong interest in pursuing music as a career. Craig began playing the trumpet in fifth grade and took or is currently taking piano lessons. He is enrolled in band in Marcus. He and Cheri both "experienced a new self-confidence and eagerness to learn" following their transfers to Marcus. Id. at 5.

With respect to Appellant's youngest daughter, Cathy, we learned that she has been a Marcus student since kindergarten and was designated a talented and gifted (TAG) student there and participated in a TAG program in first and second grade. Her parents pulled her from the program this year to allow other qualified students the same opportunity, as the program is limited by law to 3% of the district budget enrollment if additional allowable growth money is sought. See Iowa Code section 442.31(1985). Cathy is apparently a good student who does especially well in reading.

Appellant concentrated much of his testimony on the distinctions between the Marcus and M-C school districts. He cited the number of courses available (he said M-C has 72 credits to Marcus' 84, excluding music, physical education and driver education), the offering of Spanish rather than French as a foreign language at M-C, and the fact that physics and chemistry are each offered yearly at Marcus as compared to alternating

years at M-C. Mr. Anderson also discussed the difference in professional staff between the two districts. His belief, undisputed by Appellee, was that the Marcus staff has more teaching experience, more graduate hours, fewer class preparations per teacher, and a lower turnover rate than the M-C staff. He pointed to his third grader's class size to illustrate distinctions in pupil-teacher ratios. Cathy is in a class of thirty-one students at Marcus, taught by two certified teachers, effecting a pupil-teacher ratio of approximately 15:1. At M-C, one third grade teacher instructs 22 pupils, for a ratio of 22:1. (Appellee's Exhibit 10 shows 21 students enrolled in third grade at the time the Exhibit was printed.) Marcus is the larger district by over two hundred students.

Appellant also alleged that art is not taught by an "art teacher" in the elementary grades at M-C, and that differences in the music programs could be best summarized by comparing ratings from several contests. Marcus students received predominantly I and II ratings (superior and excellent) while M-C students received mostly two and three ratings (excellent and good). Exhibit A.

His overriding motivation for seeking the tuition for his children was and is his desire to reunite his family on the Cleghorn farm. In addition, he cited "community attitude toward our stand on school [which] has led to several incidents of vandalism. . . . One child remaining at M-C would be made uncomfortable by peers and teacher attitudes." Exhibit B at pp. 7-8.

Following Appellant's appearance before the M-C board on July 8, he received a letter from Board Attorney Steven Avery requesting, on behalf of Appellee, a signed release from appellant Anderson of his children's educational records (from Marcus) with a release form attached. Appellee's Exhibits 1, 2. Mr. Avery's letter told Mr. Anderson that the records were needed by the board to "review the needs and development of your children and also to determine what programs the Meriden-Cleghorn district has available for your children. . . . Without that information, it is virtually impossible for the Board of Directors to make a decision concerning your children." Appellee's Exhibit 2.

Mr. Anderson signed the form, but refused to release his children's private educational records. Exhibit 1. He wrote back to Mr. Avery stating that he had already given his reasons for alleged inappropriateness at the July board meeting, offering to discuss them at that time. Previous Record at 12. Appellant also wrote to Superintendent Anderson at Meriden-Cleghorn stating that his refusal to release student records was because:

> We feel the personal and student records of Craig, Cheri and Cathy Anderson cannot answer questions about their school choice any better than a private discussion by Koreen and/or I with the board. We are also concerned with the use of this information as grades and test scores can be sensitive for teenagers and their peer groups. . . . Hopefully we can discuss how the tuitioning can be handled with tact and courtesy.

Appellee's Exhibit 3.

Appellee school district is located in Cherokee County and has at all times relevant to this appeal been an approved school district. Meriden-Cleghorn is organized into one grade school serving students in kindergarten through sixth grade, and a junior-senior high serving grades seven through twelve. The elementary classes are self-contained through grade four and departmentalized thereafter. Superintendent Anderson testified to a total enrollment figure of 253 students.

Appellee's Exhibit 8 is a copy of the most recent school visit report completed by John Hunter of the Department of Public Instruction. The site visit was made on May 9, 1984. Exhibit 8. Overall comments were good. The report indicates that at the time of the visit the district was experiencing no budget problems, and only minor repairs to the facility were recommended. Id. at p. 1. Recommendations for upgrading the system were directed primarily to computer instruction. Id. at p. 3. Mr. Hunter suggested adding one or two more computers and one printer, and additional teacher in-service in computer training and teaching. Id.

Hunter noted that the district was contemplating reorganization, but he made no recommendation other than to encourage a decision based on fact and the best interests of the students rather than emotions and personal preferences. Id. The regional consultant also applauded the district for its efforts in the area of drug and alcohol abuse instruction and community use of facilities. Id.

The 1985-86 district Handbook (Appellee's Exhibit 10) illustrates curricular requirements. Forty credits are currently required for graduation to be obtained between grades nine and twelve. Those credits and additional course offerings appear in each subject area as follows:

Category	Required Credits	Available Credits
Science*	4	8
English	7	9
Social Science	5	9
Mathematics	5	13
Computer Science (grades 11 and 12 only)	1	2
Foreign Language (French)	0	4
Physical Education	1 (1/8 each sem.)	1
Electives	17	37**
	40	83

Exhibit 10 at pp. 1, 17.

*Chemistry was not listed in the course offerings on p. 17, but physics was listed twice ("jr. year" and "sr. year"). We will presume this was a typographical error in that testimony on both sides indicated physics and chemistry are offered in alternating yearly sequence.

**This estimated count assumes that a student may take vocal or instrumental music every semester (1/4 credit per semester) between grades nine and twelve, but may not repeat general music nor any other courses for credit. Superintendent Anderson testified that "if needed," music credits count toward graduation.

The district employs Leland Anderson as superintendent and athletic director. The elementary school principal and K-12 guidance counselor is Robert Byers, who also teaches elementary physical education. Paul Pederson serves as junior-senior high school principal in addition to teaching physical education and coaching. There are twenty-two full-time certified staff and three part-time staff members. A nurse is on duty one day per week. Learning disabled students are taught on site, but Appellee's other special education students are served in nearby districts. The district is not party to any other academic sharing agreements with other school districts under Iowa Code sections 257.26, 282.7, or 280.15.

In terms of total experience, teachers and administrators in the M-C system have an average of thirteen years. The balance is healthy: six teachers have between zero and five years experience, four have taught from six to ten years, fifteen staff members have eleven to twenty years of experience, and four have put in more than twenty years in the classroom. Appellee's Exhibit 13.

The secondary staff does appear to be very fully utilized. Of fifteen staff members teaching in an eight-period day, one has seven preparations (different courses to teach in a day), five have six, two have five, and six have fewer than five preparations. Appellee's Exhibit 14. No evidence was submitted regarding the number of graduate hours or advanced degrees obtained by certified staff at M-C.

Exhibit 12 illustrates music program events in the M-C district. In the 1984-85 school year, a musical was held, five vocal music events took place, and the band entered five contests and performed in a college homecoming parade. A variety of bands are available to the instrumental music student including marching band, jazz combo, and festival band along with an opportunity for solo performances. Appellee's Exhibit 12.

From 1980 to 1986, teacher turnover at Meriden-Cleghorn averaged approximately four per year or slightly over fourteen per cent of staff yearly. Appellee's Exhibit 21. No figures regarding the state or national averages of teacher turnover were submitted.

Beyond co-curricular opportunities such as band and vocal music, we do not address activities such as wrestling and golf raised by Appellant before Appellee's board of directors because Iowa Code section 280.16 under which this appeal is taken limits our review to instructional programming as opposed to educational programming. See I.A.C. 670--3.5(2).

II.
Conclusions of Law

Appellant's request for a review of Appellee board's decision is based on Iowa Code section 280.16 which became effective July 1, 1985. That statute reads as follows:

> 280.16 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).

Mr. Anderson's appeal was heard, along with four other Appellants' cases, shortly after a hearing panel heard the first such appeal under this new Code section. See Berg, et al. v. Lakota Consolidated Independent School District, 4 D.P.I. App. Dec. 150 (January, 1986). In that case a similarly constituted hearing panel struggled with the definition of "appropriate" versus "inappropriate" instructional programs. Id. at 169-176. In Berg, we resolved three issues: first, that a school district's approval status is not controlling on the issue of appropriateness; second, that the statute contemplates decisions as to appropriateness being made on an individual student basis by reference to each child's needs and abilities; and third, that the statute contains a residency requirement on which standing to be heard is founded. Id. at pp. 174, 168, and 164.

Appellee moved to dismiss this appeal on the ground that Clarence Anderson's children do not reside in the Meriden-Cleghorn District and thus Appellant lacks standing under the statute. The issue was taken under advisement and the hearing proceeded, allowing the Panel to hear evidence of the residency of Craig, Cheri, and Cathy Anderson. We shall now resolve that issue.

Iowa Code section 280.16 specifically refers to the board of "the district of residence of the student" as the designated governmental body to hear the case. Appellee argues that the Anderson children no longer live in the M-C District but reside with their mother at a fully furnished home in neighboring Marcus. Further evidence of their residency status is arguably the fact that the Marcus District views these children as residents, charging them no tuition to attend school there. (A school district must by law charge non-residents the maximum tuition rate as determined in the Code. Iowa Code § 282.1(1985)). Appellant, on the other hand, alleges that his children have "dual residency" status by virtue of their two homes.

The Code does not address such a dual residency situation, so we must resort to case law and departmental rulings and decisions for a resolution of the issue.

The leading case on residency for school purposes in Iowa continues to be Mt. Hope School District v. Hendrickson. In that case, a family had

moved from Iowa to Canada where the mother died. Mt. Hope, 197 Iowa 191, 193, 197 N.W.47, ____ (1924). The father, unable to properly care for his two teenage sons, sent them back to Iowa to live with relatives. Id. Their uncle, a resident of the Mount Hope School District, was named guardian, and the boys attended school in the Spring Hill District which had a four-year high school. Id. A statute then in existence authorized their attendance in Spring Hill at Mt. Hope's expense if Mt. Hope did not provide a four-year high school. Id. at 192, 197 N.W. at ____. The Mt. Hope School District resisted the payment of tuition, claiming the boys were not actual residents of that district but were really residents of Canada because their father lived there. Id.

The court found the boys to be actual residents of the Mt. Hope School District. Id. at 194, 197 N.W. at ____. In so ruling, the judge looked at factors of intent as well as the boys' living arrangements. Id. The court's test was, "If a minor leaves the home of his father, to reside in another place for the sole purpose of securing free public school education, without bringing with him an actual residence, and with the intent to return to his former residence, he does not become an actual resident, within the purview of our school law." Id. (emphasis added). Accord, 1958 O.A.G. 198; 1938 O.A.G. 69; 1934 O.A.G. 355; 1 D.P.I. Dec. Rul. 1 (1975); 1 D.P.I. Dec. Rul. 80 (1984).

In this case, Appellant testified that the children live in Marcus with their mother "six to seven days a week" for "nine months of the year," returning to the Cleghorn farm in summers. No reason was proffered for the purchase of the home in Marcus other than to secure free tuition in that district. Appellant also testified that it is his and his family's intent to reunite and once again live together on the family farm.

We find that the Mt. Hope test has not been met in this case. The move was effectuated "for the sole purpose of securing free public school education" and there is "a clear intent to return" to the farm (or stated conversely, no intent to remain in Marcus). Consequently, we find the Anderson children's primary residence for school purposes is in the M-C District, and thus Appellant has standing to bring his case before Appellee's board. Appellee's motion to dismiss for lack of standing is hereby denied.

Appellee also moved to dismiss the appeal for Appellant's alleged failure to file an "affidavit" of appeal as required by Iowa Code section 290.1. Appellant requested the instant review in a properly notorized letter to the state commissioner of public instruction.

An affidavit is defined as "a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath." Black's Law Dictionary, fourth Edition, p. 80. The Iowa Code defines affidavit as "a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state." Iowa Code § 622.85(1985).

Appellee contends in its motion to dismiss that "The letter from Clarence A. Anderson dated August 13, 1985, is not an affidavit as defined

In Iowa Code § 622.85." Other than this bare assertion, no proof was offered that the statement was not made voluntarily, that the notary public affixing her seal and signature was unauthorized, or that in any other way the sworn declaration made by Clarence Anderson was invalid. Perhaps Appellee was troubled by the informality of the affidavit in that it took the form of a letter and was not prefaced by a statement proclaiming it to be a sworn document made under oath, as an attorney might prepare such a document. However, under Chapter 17A of the Code of Iowa, one of the stated purposes behind adoption of the Iowa Administrative Procedure Act is "to increase the fairness of agencies in their conduct of contested case proceedings." Iowa Code § 17A.1(1985). "Fairness" in this case is furthered when this agency accepts an informal document which substantially complies with the jurisdictional affidavit requirement. We have no reason to question the validity of Appellant's affidavit of appeal. All of the elements of an affidavit have been met; the letter is a statement made under oath, properly notorized, and Appellant has the requisite claim of aggrievement or injury. Proferring no evidence of invalidity, Appellee's Motion to Dismiss for failure to effect a proper affidavit is denied.

A more difficult problem is presented on the merits of this case because Appellant refused to provide the educational records of his children when requested by Appellee's board. Under federal and state law, parental consent is required before an educational institution may release confidential records of a student. See 41 C.F.R. section 99.30; Iowa Code section 22.7(1)(1985). Appellant was exercising his legal right when he denied the board access to his children's records. Nevertheless, by that action he was also denying the M-C board an opportunity to confirm or challenge his characterization of his children's needs and abilities for purposes of evaluating their instructional programs.

Attorney Avery's letter to Clarence Anderson (Exhibit 2) stressed the board's need for that student information in order to make a decision. We believe the request was a reasonable one and within the implied process of review in new section 280.16. As appropriateness is determined with respect to a child's needs and abilities, (Berg, et al., 4 D.P.I. App. Dec. at 168 [emphasis added]) records showing grades, courses taken, and test scores are clearly relevant. We do not expect a local board, when presented with a request of this magnitude, to base its decision solely on the facts as the child's parent or guardian presents them.

Appellant's reason for denial of consent appears to be his concern that his children's test scores, grades, and other confidential information not be freely discussed at an open meeting. Yet he indicated by letter his willingness to provide some or all of the information verbally. Previous Record at pp. 12, 13. Further, he offers no basis for his fear that the board would not respect the confidentiality attached to those records. In fact, our reading of Iowa Code chapter 21 (the "open meetings law"), belies this fear. That chapter authorizes a governmental body to hold a closed session to "review or discuss records which are required or authorized by state or federal law to be kept confidential. . . ." Iowa Code section 21.5(1)(a)(1985).

We find, therefore, that Appellant's refusal to provide the M-C board with student records was unreasonable and not in accordance with the spirit of the law. Applicable here is the age-old legal maxim, "He who

seeks equity must do equity." And, as we stated in Berg, et al. v. Lakota, "the clear legislative intent [of section 280.16] is that a student, through his or her parents or guardian, must prove inappropriateness of program with respect to [each] student's needs or abilities." 4 D.P.I. App. Dec. 150, 168 (emphasis added). "Proof" requires more than mere allegations. The proponent has the burden to show by a preponderance of evidence, that despite state approval status, the school district is not providing appropriate instructional programming for his or her child or children.

We are, however, disinclined to dismiss this appeal (and the others heard in conjunction therewith) on that basis. We feel a responsibility under due process principles to apply this ruling prospectively only. Henceforth, in all appeals (reviews) brought under section 280.16, we shall entertain a party's Motion to Dismiss on the basis that the party seeking relief did not comply with reasonable requests for relevant information necessary to make a decision with regard to appropriateness of instructional program.

Appellant in this case has not sustained his burden of proof that Appellee has denied his children appropriate instructional programs. This hearing panel was given all student records of each child (which indicates Appellant's recognition of their importance in reaching a decision), but we heard very little about needs and abilities which were not being or would not be met in Appellee district. In the first case we decided under section 280.16, we established that appropriateness of instructional program is to be determined on a case by case basis, focusing on student ability and needs. Berg, et al. v. Lakota Consolidated Independent School District, 4 D.P.I. App. Dec. 150, 174 (1986).

We know that Cheri, now a sophomore in high school, had a reading disability which has disappeared or dissipated over the last five years and that she has improved her grades over the same period. Appellant points to the change in schools as the reason for her improvement. Presumably he believes that this is evidence or proof that Cheri was receiving inappropriate instruction at M-C. However, the same result could be due to two years of special education assistance (one year in each school system) as well as several years of remedial reading instruction at M-C prior to being diagnosed as a child in need of special education. The concept of special education is to identify learning problems early in a child's life and to alleviate or minimize them; it does not contemplate a lifelong label signifying a child's inability to conquer those problems. Many children experience reading difficulties in the early years, only to overcome them with the kind of training and help that Cheri received from teachers in both school districts.

It is difficult to discern what was inappropriate for Craig Anderson in the M-C district other than a turnover of music instructors while Craig was still enrolled in that district. We do not question his enthusiasm for music, even his intention to find a career in that field, but other than slightly lower student ratings at music contests, Appellant was at a loss to show what was absent in or inappropriate about M-C's music program. Marcus has both vocal and instrumental music programs; Appellee also offers both. Marcus students participate in concerts and contests; M-C also has individual and group co-curricular opportunities in vocal and instrumental music, including participation in some of the same events.

Craig was a good student at M-C and continues to be a good student at Marcus. There is simply no evidence from which this Panel could find inappropriateness of M-C's programs for Craig. (We have not dealt with Appellant's reference to wrestling and golf for Craig which was made before the M-C board in July. We do not recognize our jurisdiction in these reviews as extending to purely extracurricular programs. See discussion supra at page 198 and Berg, et al. v. Lakota at page 174 n.1.)

The only evidence of alleged inappropriateness of program at M-C for Appellant's youngest daughter Cathy was her identification for and participation in a talented and gifted student program at Marcus. Her parents voluntarily withdrew her from the program after two years. Yet they argue that M-C's enrichment opportunities (Appellee's alternative to a formal TAG program) are insufficient to meet Cathy's needs. This seems more than slightly inconsistent, to argue that she is a TAG child currently receiving no special programming and for whom it would be inappropriate to be in M-C where enrichment activities would be available and presumably offered to her.

The rest of Appellant's testimony and evidence centered on a comparison between the two districts, with criticisms of Appellee for offering French instead of Spanish, for failure to offer a human relations course (they offer sociology) and institute a peer helper program. Yet Appellant never tied those "failings" of Appellee to the needs or abilities of his children. He persisted to argue in his presentation to the Panel that Marcus was the superior district by comparison, but failed to offer a scintilla of evidence that due to, for example, the high number of preparations per teacher at M-C the instructional programs suffered and became inappropriate for his children. Although Appellant made his preferences clear, he failed to prove that M-C's programs were inappropriate for Craig, Cheri, or Cathy Anderson.

We are concerned about the ramifications of devisiveness in educational philosophy present in the Meriden-Cleghorn district. Appellant Anderson testified that "community attitudes toward our stand on school [have] led to several incidents of vandalism [such as] having our mailbox painted, throwing raw eggs on our car, phone calls and obscene messages." He did not allege that such incidents were perpetrated by officials of Appellee district, nor did he name any individual as being responsible. We do not doubt that these things occurred. Obviously, such incidents would make any citizen angry and uncomfortable. We sympathize with his feelings and his perception of ill-will directed towards him and his family, but to find the district inappropriate on that basis would be to ignore the focus of the statute (instructional programs) and hold the district responsible for the actions of immature, irresponsible members of the community who are most likely acting of their own malicious will. Saddened and dismayed as we are when we hear of such hostility over school issues, we cannot rely on such allegations to find inappropriateness of instructional programs, in this or any other case.

Following this hearing, after the evidence was closed but before the decision was rendered, Mr. Robert Byers, elementary principal and guidance counselor at Meriden-Cleghorn, wrote to Dr. Benton, state commissioner and presiding officer of the hearing. Dr. Benton did not read the letter, having recognized it as ex parte communication. The letter was placed in the custody of a non-panelist staff member.

Iowa Code chapter 17A, the Administrative Procedure Act, governs, among other procedures, contested cases heard by agencies. See Iowa Code §§ 17A.11-.17(1985). Section 17A.17 governs ex parte communications, and subsection 2 of that Code provision reads as follows:

> 2. Unless required for the disposition of ex parte matters specifically authorized by statute, parties or their representatives in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact or law in that contested case, with individuals assigned to render a proposed or final decision or to make findings of fact and conclusions of law in that contested case, except upon notice and opportunity for all parties to participate as shall be provided for by agency rules. The agency's rules may require the recipient of a prohibited communication to submit the communication if written or a summary of the communication if oral for inclusion in the record of the proceeding. As sanctions for violations, the rules may provide for a decision against a party who violates the rules; for censuring, suspending or revoking a privilege to practice before the agency; and for censuring, suspending or dismissing agency personnel.

Iowa Code § 17A.17(2)(1985). Departmental rules, found in the Iowa Administrative Code at chapter 670--51.7, complement the Code provision. Rule 51.7(2) directs that any correspondence in violation of these rules shall be included in the record of the proceeding. We have done so.

We must censure Mr. Byers and the Meriden-Cleghorn District for allowing this communication to be made. Appellees were sent a copy of our hearing procedures at the outset of this appeal, and thus informed, there is no excuse for such a flagrant violation. Should it recur, we would not hesitate to take stronger action against the district.

III.
Decision

For the reasons delineated above, the decision made by the Meriden-Cleghorn board of directors on August 12, 1985, denying relief to Clarence Anderson is affirmed. All other motions and objections not ruled on previously are hereby overruled. Appropriate costs of his appeal under Chapter 290, if any, are assessed to Appellant.

February 13, 1986
DATE

Lucas J. DeKoster
LUCAS J. DEKOSTER, PRESIDENT
STATE BOARD OF PUBLIC INSTRUCTION

February 3, 1986
DATE

Robert D. Benton
ROBERT D. BENTON, Ed.D.
COMMISSIONER OF PUBLIC INSTRUCTION
AND PRESIDING OFFICER