IOWA STATE BOARD OF
PUBLIC INSTRUCTION

(Cite as 4 D.P.I. App. Dec. 197)

In re Dennis J. Bush	:	
	:	
Dennis J. Bush, Appellant	:	
	:	DECISION
v.	:	
Meriden-Cleghorn Community School District, Appellee	:	[Admin. Doc. 822]

The above-captioned matter was heard on September 27, 1985, before a hearing panel consisting of Dr. Robert D. Benton, commissioner of public instruction and presiding officer; Dr. Carol Bradley, administrative consultant; and Mr. David H. 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 chapter 670--51, Iowa Administrative Code. Appellant was present, not represented by counsel. Appellee appeared through 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 of Appellee's board of directors (hereinafter board) denying his request to have his two sons released to attend the Marcus Community School District at Appellee's expense for an alleged denial of appropriate instructional programming. The hearing was held in conjunction with four other parents' requests from the same district.

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 of this appeal.

Dennis Bush and his wife, Debbie, are the parents of two school-aged boys, Nathan (10) and Randall(8). Prior to this year the boys attended the Meriden-Cleghorn (M-C) district as full-time students. In the fall of the 1985-86 school year, Appellant removed his children from the district and enrolled them in the neighboring Marcus Community School District at his own expense. This action was taken because Mr. and Mrs. Bush felt that the M-C School District was not meeting the individual needs of their sons.

A. Nathan Bush

Nathan Bush was tested by Rose Alons, gifted and talented consultant at Area Education Agency (AEA) IV on April 12, 1984, when he was in third grade. Ms. Alons' introductory remarks in her subsequent report stated:

> "Twelve subtests make up this screening form [501 Learning Abilities Test] for gifted. In order to meet the 'gifted' criteria a student must test in the gifted range in two or more of the subtests. Nathan's scores were in the gifted range in seven of the subtests."

Appellant's Exhibit E. The consultant then detailed the seven tests which showed Nathan to be a gifted student. Id. Her comments under the Conclusions and/or Recommendations section of the report read as follows:

> Nathan seems to be gifted in many areas. He was also given an IQ test which showed his IQ to be near the gifted range. I believe Nathan should be challenged, particularly in areas where he shows strength. This might include some higher level thinking activities, critical thinking activities, problem solving, creative thinking, and some independent study.

Id.

Mrs. Bush testified that she and her husband removed Nathan from the M-C system because the district did not supply or provide "anything different" in the subsequent year's programming for Nathan, despite receiving the test results and Mrs. Alons' recommendations. Nathan is not enrolled in the Talented and Gifted (TAG) program at Marcus this year because attendance in that system for one full year is a prerequisite to entry, as is a teacher's recommendation. It is presumed that he will be accepted in the TAG program if he attends Marcus next year.

Appellant's concerns also covered the heavy preparation loads of teachers in the M-C system, the turnover in staff there, the small class sizes, and lack of ability grouping to allow students to compete with their peers.

In response, the district pointed to a survey of M-C constituents conducted in March, 1982, asking both philosophical and accomplishment types of questions about the school system. Of five hundred inventory questionnaires sent out, one hundred sixty-one responses were returned for about a 32% overall response rate. (The response rates for families with children enrolled in the district was about 69%.) Only nine patrons checked "Advance classes for the gifted" as a method of improving the educational system in Meriden-Cleghorn. Appellant's Exhibit E, "Educational Assessment Inventory Statistics" at p. 1.

The board's written response to the Bush argument for talented and gifted was , "M-C does not believe in ability grouping. It has been an educationally discontinued practice." Previous Record at p. 35A. In another paragraph, similar reasons for not establishing a Talented and Gifted program at M-C were given: "Individualized achievement program revised. In a state-funded program only 3% of the students are allowed to

participate. Many patrons are not in favor of their student being singled out. We would rather serve a larger number of our students in an enrichment program based upon initiative and interest." Id.

The Individualized Achievement Program referred to above was an "enrichment" program for elementary students which was established in 1979 and discontinued at the close of the 1984-85 school year. In August and September of 1985, the board approved and adopted a new enrichment program entitled Creative Initiating Abilities or C.I.A. Appellee's Exhibit 27. The guideline for entry into this program is a composite score of at least 80% on the Iowa Tests of Basic Skills [ITBS], but the potential C.I.A. student must also have demonstrated initiative and have an interest in participating. The program is voluntary, and does not involve a change in curriculum. Students not meeting stated criteria may nevertheless be recommended for the program by individual teachers. The district contends that this program would satisfy Nathan's needs as it is designed to challenge students to do more than would normally be required of them in the classroom. Mrs. Petersen, the sixth grade teacher at M-C, has taken classes on serving gifted and talented children and is the designated instructor for the C.I.A. program.

B. Randall Bush

Randy, the youngest son of Dennis and Debbie Bush, is in third grade this year at Marcus. School has not been as easy for Randy as it has been for his older brother, and at the conclusion of the 1984-85 school year, Mrs. Bush sought outside examination of Randy to determine his special needs. Specifically, the Bushes were suspicious that Randy might be a learning disabled (l.d.) student.

E. Lynn Herrick, M.S., psychologist at the Plains Area Mental Health Center, conducted such testing on Randy and filed a report dated June 17, 1985. Appellant's Exhibit E. The Weschler Intelligence Scales for Children - Revised (WISC-R) and the Wide Range Achievement Test (WRAT) were administered. Id. The results were inconclusive. Id. at p. 3. Herrick stated in summary:

> At this point I would recommend that Randy be tested again by AEA within the school district. There are strong suspicions that he does have this learning disability and that even though he has been able to achieve a great deal of success in compensating for that difficulty, he could excel greater given the advantage of special help. Id.

The school district responded to Dennis Bush's request that his son be tuitioned to Marcus by stating that Randy had never been tested for learning disabilities, and his teachers had not recommended that he be so tested. The written statement indicated again that the district does not believe in ability grouping. Previous Record at p. 42A. The provision of special education by public schools for children requiring such assistance is required by law. Iowa Code § 281.2 (1985).

Appellee M-C employs one Linda Wescott on a full-time basis to teach reading (kindergarten, first, second and fifth grades), mathematics (first and second grades), and learning disabilities K-6. She is fully certified

to teach at the elementary level and holds approvals to teach the mentally and emotionally disabled student. In the fall of the 1985-86 school year the Department of Public Instruction issued Ms. Wescott a temporary approval for this school year as a K-9 multicategorical resource room teacher, which includes learning disabilities. It is renewable upon proof of completion of two courses in l.d. which must be taken by next September. She needs a total of twenty more hours to receive full approval for multicategorical resource room teaching.

Appellee's Exhibit 11 illustrates the district's resource room program history, concentrating primarily on its inception and implementation in 1975. Mr. Bush contends, nevertheless, that should Randy be formally identified as a child requiring special education, the M-C resource room program would not be appropriate for Randy because "I feel that my youngest child needs a teacher, adequately trained in l.d., who is able to devote the entire day to counseling and teaching Learning Disabled children." Previous Record at p. 38. Marcus has one full-time l.d. teacher and another who works part-time with l.d. students and part-time with TAG students.

Mrs. Bush also testified, albeit briefly, that Randy has an interest in art. Appellee M-C includes art in the elementary curriculum but does not departmentalize, so art is taught by regular staff who may or may not have an art degree or background. Marcus employs a full-time art teacher who works at both elementary and secondary levels.

II.
Conclusions of Law

The first issue to be addressed is Appellee's Motion to Dismiss. Therein the district raises jurisdictional questions. First, it is alleged that Appellant's notorized letter requesting a review hearing is not an affidavit within the Iowa Code definition. An affidavit is defined 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).

The letter received from Mr. Bush was properly notorized by one Stephen J. Smith. The letter did not include the traditional preface proclaiming it to be a sworn document made under oath, but we do not read into section 622.85 the requirement that any special language be included in an affidavit. Furthermore, Appellee presented no evidence on the issue of validity of the affidavit beyond the bare assertion made in the Motion. All of the elements of an affidavit have been met; the letter is a statement made voluntarily under oath, properly notorized, and Appellant has the requisite claim of aggrievement or injury. While we agree that a proper affidavit of appeal is jurisdictional, we find that Appellant has substantially complied with the affidavit requirement of Iowa Code section 290.1. Appellee's Motion to Dismiss on this ground is denied.

The district also contended in the same Motion that the question of appropriateness of program under section 280.16 was moot with respect to Nathan and Randall Bush because they are not enrolled students of the M-C district. Iowa Code section 280.16 does not contain any reference to or requirement of enrollment before a determination of appropriateness can be made, and we will not read into that section any such requirement. No

court, (nor therefore any administrative agency exercising its quasi-judicial function) has the power to write into a statute words which are not there. See, e.g. State ex. rel. Fenton v. Dowling, 261 Iowa 965, ___, 155 N.W.2d 517, 529 (1968). We deny Appellee's Motion to Dismiss on this ground as well. See also Berg, et al. v. Lakota Consolidated Independent School District, 4 D.P.I. App. Dec. 150, 164 (January, 1986).

In proceeding to the merits of this case, we must resolve the question of appropriateness of instructional program with respect to the needs and abilities of each child for whom denial of such program is made. The new statute affording parents an opportunity for State Board review, 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).

Appellant's hearing, along with the four other parents' hearings which were held on the same day, was the second opportunity this agency has had to conduct the review the legislature empowered us to conduct. In the first case, we wrestled with principles of statutory construction to try to give effect to the legislature's intent in enacting section 280.16. See Berg, et al. v. Lakota Consolidated Independent School District, 4 D.P.I. App. Dec. 150, 168-174. We concluded that appropriateness of program is to be resolved on a case-by-case basis, examining the student's needs and abilities against the district's course offerings, and considering all relevant information. Id. at p. 174.

A. Nathan Bush

In this case, we have clear evidence that Nathan Bush, has been identified as a talented and/or gifted student. Appellant's Exhibit E, Report of Rose Alons. Appellee school district does not offer a formal TAG instructional program. Instead, it has created a new enrichment program (C.I.A.) geared for high ability students, but essentially open to all students. It is modeled after a Minnesota Omnibus Program. Appellee's Exhibit 27 at p. 3. "The curriculum is neither horizontal enrichment nor vertical acceleration, but rather a combination of both--

a diagonal approach to enrichment and accelerated subject matter." Id. at p. 4. Performance is not graded. Id. The C.I.A. students will be instructed by Mrs. Petersen, the sixth grade teacher, and monitored by Robert Byers, elementary principal.

Appendix B of Exhibit 27 illustrates the units to be taught. If Nathan were accepted into this program, it appears he would be involved on four Mondays in October (Unit 2: Rock of Ages); four Mondays in December-January (Unit 4: Geo's [sic]); four Mondays in March-April (Unit 6; Chautauqua); and four Mondays in April-May (Unit 8: What's My Line?). An extensive list of media projects is available for each unit; the student can complete a project using, for example, photography, scrap books, murals, models, research papers, or puppets. Participants will be taken from the home room instruction period for no more than one hour per week. Appellee's Exhibit 27 at Appendix C.

At the time of this hearing, the C.I.A. enrichment program had not been fully implemented, but had been adopted by the board. There was no evidence, therefore, on whether or not these activities, designed to challenge the academically or artistically gifted child, will achieve their stated purpose.

We are concerned and somewhat at a loss to understand why the Meriden-Cleghorn district did not recommend to Mr. and Mrs. Bush that Nathan become involved in the former enrichment program (I.A.P.) following Ms. Alons' testing and recommendation. Nathan continued attending M-C for one full school year, apparently without the benefit of any activities geared to his ability and potential. The record is not clear whether Appellant knew that a revised enrichment program was underway, or whether in fact, it was underway at the time Nathan was transferred to Marcus. In a sense, Nathan was "denied entry into an instructional program appropriate" for him one year ago when he was in fourth grade.

In fifth grade now, Nathan is receiving no specialized TAG assistance at Marcus because of a prerequisite he cannot meet until next year. Were he at M-C, he may or may not have been selected for the C.I.A. program for this year. If he were to return to M-C, he would only be eligible for this TAG-type assistance for one more year, as the C.I.A. program is not available to students beyond the sixth grade.

The state approval standards for schools found in Chapter 257 of the Iowa Code do not require the adoption of a talented and gifted program. If a district chooses to establish such a program, it is limited to identifying no more than three percent of its budget enrollment if it seeks additional allowable growth to finance the program. Iowa Code § 442.31 (1985). The Iowa Code also requires formalized program plans if a district seeks additional funding for a TAG program. Iowa Code § 442.32. A district choosing to adopt and finance a TAG program without additional funding assistance may do so and disregard the 3% limitation.

If the district chooses to follow Chapter 442 TAG guidelines, it must follow the provisions of section 442.33 defining talented and gifted students. "Gifted and talented children are children who require appropriate instruction and educational services commensurate with their abilities and needs beyond those provided by the regular school program." Iowa Code § 442.33 (1985).

The results of Nathan's TAG testing indicate he has outstanding potential or ability in visual closure (needed for reading), vocabulary (regular and mathematics), analogical reasoning (spelling), symbolic recall (arithmetic), symbolic transformations (problem-solving), and symbolic implications (logic and algebra.) To meet his potential, therefore, it is apparent that Nathan should be given supplemental assistance or instruction in mathematics-related areas as well as language-related areas. It does not appear that the C.I.A. curriculum has a unit devoted to numbers, mathematics, or problem-solving skills. Instead, the program appears to utilize high-interest areas of the regular curriculum such as the study of rocks, drama and plays, and careers of interest.

Because section 280.16 directs appropriateness to the individual student, we find that the C.I.A. enrichment program is not designed to meet the needs and abilities of students with the abilities possessed by Nathan Bush. Furthermore, if he were enrolled in this program he would only benefit for one year, then once again be submerged into the regular curriculum because the enrichment activities cease after sixth grade. We find, therefore, that the Meriden-Cleghorn school district's current program denies Nathan an appropriate instructional program.

When the State Board so finds, the legislature has granted the Board the broad power to order the local district to "provide or make provision for" appropriate programming for the student. Iowa Code § 280.16. We interpret that language to enable us to look at available options for the district to follow. In this case, Appellee could provide appropriate programming for Nathan by, among other options, expanding its C.I.A. program to include units in mathematics and extending the program beyond the sixth grade, by entering into a sharing agreement with a neighboring district which has a TAG program, or by tuitioning Nathan to a neighboring district which has a TAG program at M-C's expense. Any of these options or others devised by the parties necessitate Nathan's re-enrollment into the Meriden-Cleghorn School District.

B. Randall Bush

While we have concluded that Appellee denied an appropriate instructional program to Nathan as a gifted and talented student, we cannot find such a denial with respect to Randy Bush. At the time of this hearing, Randy had not been formally identified as a special education student. Even if he had, Appellee has an established learning disabled/resource room program which should meet his needs.

Iowa Code section 280.16 was modeled after a special education statute, Iowa Code section 281.6. Berg, et al. v. Lakota Consolidated Independent School District, 4 D.P.I. App. Dec. 150 at 170. The special education law in general affords parents a hearing opportunity to challenge identification, placement, or provision of appropriate education for the special education student. See Iowa Code § 281.6 (1985) and Iowa Administrative Code chapter 670--12.32-.45. We find those procedures are the best method available for obtaining review of a special education student's needs.

Further, at the time a pupil is designated as a special education student, a staffing is mandated to determine his or her program for

delivery of needed services. Iowa Administrative Code chapter 670--12.18 et seq. The staffing meeting results in an individualized educational program (I.E.P.) for each special education student. Id. at 12.18(2). Expert personnel other than district employees are part of the process, as are the child's parents. Id. If it is determined that the resident district cannot alone provide appropriate programming for the pupil, arrangements may be made to serve the child in another district or by the Area Education Agency (AEA). Iowa Code § 281.2 (third unnumbered paragraph (1985). Such a determination is made by the entire staffing team. Id. In all, these procedures assure, as much as possible, parental involvement and satisfaction that the child's needs are being met.

There being no other relevant evidence of inappropriateness, we are constrained to hold that Appellant has not met his burden of proof with respect to Randy's instructional programs. Furthermore, special education hearing procedures (should Randy be identified as a special education student) are the exclusive administrative remedies for alleged inappropriateness of a special education student's programs. In contrast, section 280.16 was designed for review of a regular student's instructional programming.

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 finding 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 of the Meriden-Cleghorn board of directors made on August 12, 1985, denying the desired relief to Appellant is hereby reversed in part and affirmed in part. We have found a denial of appropriate programming by Appellee with respect to Nathan Bush and reverse the board's decision in his case. Because there is likewise no evidence that Marcus' programming is appropriate for Nathan's needs, we cannot order Appellee to reimburse Appellant for first semester tuition. With respect to the second (current) semester (Spring 1986), Appellee shall meet with Appellant to discuss which of the options listed above, or any other mutually satisfactory arrangement, will best meet Nathan's needs. As the district of residence, the responsibility for providing appropriate programming rests first with Meriden-Cleghorn. Any reasonable proposal for delivery of the type of programs Nathan should have for the remainder of his education will satisfy the burden placed on the resident district. Agreement will necessitate Nathan's enrollment in Meriden-Cleghorn to effectuate any method of program delivery.

For the reasons delineated above, the decision of the Meriden-Cleghorn board of directors made on August 12, 1985, denying the desired relief to Appellant in the case of Randall Bush is affirmed.

All other motions and objections not previously ruled upon are hereby denied and overruled. Appropriate costs of this appeal, if any, under Chapter 290 are hereby assigned equally to Appellant and Appellee.

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