IOWA STATE BOARD OF
PUBLIC INSTRUCTION

(Cite as 4 D.P.I. App. Dec. 191)

In re Emmet Wolf	:	
	:	
Emmet Wolf, Appellant	:	
		DECISION
v.	:	
Meriden-Cleghorn Community School District, Appellee	:	[Admin. Doc. 821]

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 M. 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 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 his request to have his son attend school in the Marcus School District at Appellee's expense for alleged denial of appropriate instructional programs. Appellant's hearing was held in conjunction with those of four other parents, all from similar decisions of Appellee's 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 of this appeal.

Appellant Emmet Wolf and his wife Mary Lu are the Parents of Patrick Wolf, the subject of this appeal. Pat lives with his father on the family farm in the Meriden-Cleghorn (hereinafter M-C) district, but attends school in the Marcus district. Mr. Wolf is currently paying nonresident tuition as required by Iowa Code section 280.1. Mary Lu Wolf recently moved to Louisiana where she works as a nurse to supplement the family income from the farm.

Patrick Wolf is a high school junior. He attended M-C schools through the seventh grade. At that time his parents chose to send him to Marcus because of their dissatisfaction with the M-C district. He attended Marcus through ninth grade, then following the first semester of tenth grade, he transferred to Lafayette, Louisiana where he completed his sophomore year while living with his mother. He returned to Marcus in August 1985, just prior to the hearing in this case.

When Pat was in first grade at M-C, he qualified for and was placed in a special education program for students with learning disabilities (l.d.). He did not achieve very high marks, particularly in writing, reading, spelling, and arithmetic. Appellant's Exhibit H, "Elementary Scholastic and Attendance Record." In his father's words, Pat's "education was at a standstill" by seventh grade.

Pat's five older brothers had also attended M-C schools for all or most of their education. Scott, Pat's next brother in age, was also in the learning disabilities program. When M-C dropped wrestling from its extracurricular offerings, a sharing agreement was entered into between M-C and Marcus. Scott, a wrestler, traveled to Marcus for practices and meets and eventually enrolled there in the spring of 1981 under a guardianship. After one year at Marcus, he was able to leave the special education program. His grades steadily improved, and he finished his education, graduating in good standing. Scott's educational accomplishments are relevant to this case as providing the basis upon which Mr. and Mrs. Wolf made their decision to transfer Pat.

Pat, too, was an l.d. student. Like Scott, Pat wanted to wrestle and his parents found that the academic eligibility policy for wrestling (and all sports) was a prime motivator for their boys to study. Appellant places much emphasis on M-C's alleged inability to motivate Pat and Scott. When Scott's attitude and grades improved at Marcus, the decision was made to send Pat there on the assumption that he, too, would respond in a positive fashion.

At the close of Pat's first year at Marcus, his tests showed a marked improvement; he had gained two grade levels in reading skills and one and one-half grade levels in comprehension. His attitude also improved, and he showed a willingness to study that had previously been lacking. Upon his transfer to Louisiana for one semester, he received the best grades of his education.

Appellant objects to the departmentalization in the Meriden-Cleghorn junior high. He stated that the lack of a "strong home room concept" results in junior high students feeling "they no longer need supervision and structure and that they are capable of managing their own lives without interference from adults." Appellant's Exhibit I at p. 3.

This attitude allegedly results in poor discipline at M-C. Mrs. Wolf visited one of Pat's classes when he was in seventh grade and was dismayed to see and hear a good deal of visiting between students during class. The principal acknowledged the situation and did not seem as concerned as Mrs. Wolf expected him to be.

In Mrs. Wolf's notorized statement to the hearing panel, Appellant's Exhibit J, she also focused on the alleged lack of motivation of students

at M-C. She stated that in her opinion, schools should offer a variety of academic and extracurricular activities to motivate students, but that "with the poor economy in Iowa and loss of students, that is impossible for our small schools to achieve." Exhibit J at p. 3. She cited negative attitudes of some M-C high school teachers and the acceptance by M-C's principal of the fact that some of the teachers were not performing to expectations.

Appellant made his request to Appellee board on August 12, 1985, at a regular board meeting. In his statement to the board, he cited the academic growth Pat experienced at Marcus, despite M-C's alleged attitude that Pat would not or could not learn. He also cited seventh grade reading at Marcus as not available at M-C, Pat's improved grades, and Marcus' superior discipline. Mr. Wolf further contended that the M-C counseling program suffers because the counselor, Mr. Byers, is also a principal, teacher, and coach. His final reason for M-C's inappropriateness for Pat is the failure to offer wrestling, which has been important for his sons. The board denied his request that M-C pay his son's tuition to attend Marcus in a 3-2 vote.

No evidence was offered on Pat's current instructional programs at Marcus which would or would not be available at M-C. Appellant rests his "inappropriateness" allegation primarily on intangibles -- the encouragement students should receive from teachers, counselors, and administration. He points to Pat's (and Scott's) improvement at Marcus to prove that M-C was unable or unwilling to motivate his sons to achieve their potential.

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. Appellee's 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 district employs Leland Anderson as superintendent and athletic director. Elementary Principal and K-12 Guidance Counselor is Robert

Byers, who also teaches elementary physical education. Paul Pederson serves as junior-senior high 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 academic sharing agreements with other school districts under Iowa Code sections 257.26, 282.7, or 280.15.

II.
Conclusions of Law

Appellee district has moved to dismiss this appeal on two grounds; first, for Appellant's alleged failure to file an affidavit as required by Iowa Code section 290.1, which meets the definition of section 622.85 of the Code of Iowa; and second, that Pat's enrollment in Marcus renders moot the appropriateness of instructional program issues at M-C under Iowa Code section 280.16.

Appellant's affidavit took the form of a letter but was properly notorized by one Beverly J. Nafziger. The letter did not include the traditional preface proclaiming the statement therein to be a sworn document made under oath. 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). We do not read into that section the requirement that any special wording be used to create a valid affidavit. Furthermore, Appellee presented no evidence on the issue of validity beyond the bare assertion made in the Motion. We find that all of the elements of a proper affidavit have been met. The letter is a statement made voluntarily under oath, properly notorized, and Appellant asserts the requisite claim of aggrievement or injury. Appellee's Motion to Dismiss on this ground is denied.

With respect to the mootness argument under section 280.16, we also find Appellee has failed to carry its burden. Iowa Code section 280.16 does not contain any reference to or requirement of enrollment in the resident district 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). Furthermore, we resolved this issue in the first section 280.16 appeal we heard. Berg, et al. v. Lakota Consolidated Independent School District, 4 D.P.I. App. Dec. 150, 164 (January, 1986). Appellee's Motion to Dismiss is denied on this ground as well.

Iowa Code section 280.16 became effective on July 1, 1985, and 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).

In this case we have a dearth of information on which to find inappropriateness of instructional programs for Pat Wolf. While we recognize the inherent difficulty of proving inappropriateness, Appellant did not or could not focus his evidence on M-C's instructional programs. Instead we were presented with opinions as to teacher and administrator attitudes and criticisms of the school district in general. In fact, Appellant became the most specific in his testimony with regard to the junior high programs; Appellant's son is now in eleventh grade and far beyond any problems related to seventh and eighth grade programming.

We do not interpret section 280.16 as a road down which an appellant may drive to deliver a load of generalized grievances about his resident school district. The key to proving inappropriateness of program lies in concretely illustrating a student's needs and abilities. Those facts must then be coupled with a showing that the district, although capable of providing the appropriate programming, has nevertheless made a decision not to do so to the student's detriment.

In this case Appellant has not met either burden. We do not have a clear picture of Pat Wolf; his portrait was a mere sketch. The district has been painted with broad, sweeping strokes, and too often the artist's hand left the canvas entirely. As we stated in Berg, et al., supra:

> [W]e are mindful that the danger exists that 'appropriate' may become synonymous with 'desirable,' an interpretation we do not espouse. A school's atmosphere, or a teacher's methodology, motivational technique, or competency, or other 'intangibles' should not, in our opinion, serve as the basis of an 'appropriate instructional program review.'

4 D.P.I. App. Dec. 150 at 174.

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 foregoing reasons, the decision of the Meriden-Cleghorn board of directors made on August 12, 1985, denying the desired relief to Appellant is hereby affirmed. All motions or objections not previously ruled upon are denied and overruled. Costs of this appeal under chapter 290, if any, are thus 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