IOWA STATE BOARD
OF EDUCATION
(Cite as 14 D.o.E. App. Dec. 143)

In re Jesse Bales, *et al.**	**:**	
Rebecca Bales, *et al**., Appellants,	**:**	
v.	**:**	DECISION
Des Moines Independent Community School District, Appellee.	**:**	**[Adm. Doc. #s **]**

The above-captioned matters were consolidated and were heard together on April 30, 1997 before a hearing panel comprising Dr. Tom Andersen, consultant, Bureau of Administration, Instruction and School Improvement; Dr. Gary Borlaug, consultant, Bureau of Practitioner Preparation and Licensure; and Amy Christensen, J.D., designated administrative law judge, presiding. The following Appellants were present: Mr. Mark and Mrs. Elizabeth Ring, Ms. Vikki Reelitz, Mrs. Kari and Mr. Jim Saunders, Mrs. Rebecca Bales, Ms. Darcy Boylan, Mrs. Joni Cosner, Ms. Julie Hess, Ms. Carmen Larson, Mrs. Wanda Long, Mr. Loren Lown and Ms. Janette Diamond, Ms. Kathy McCoy and Mr. Jared Harridge, Ms. Tammy McDowell, Ms. Jackie Miller, Mrs. Debra and Mr. Kevin Nabity, Ms. Mary Ross, Ms. Patricia Ruden, Mr. Jim Schumacher, Ms. Carol Sweet, and Ms. Pamela Wilkins. Appellants Ms. Maureen Jacobson, Ms. Terri Kauer, Ms. Katherine Lenhart, and the Levines did not appear at the hearing. All the Appellants were unrepresented by counsel. The Appellee, Des Moines Independent Community School District [hereinafter, "the District"], was present in the person of Dr. Thomas Jeschke, Executive Director of Student Services. The District was unrepresented by counsel.

An evidentiary hearing was held pursuant to Department Rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for the appeals are found at Iowa Code sections 282.18(3) and 290.1(1997). The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the consolidated appeals before them.

The Appellants seek reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on January 21, 1997, which denied their applications for open enrollment out of the District, beginning in the 1997-98 school year.

***"*et. al.*" means "and others."**

****Adm. Doc. #s 3834, 3835, 3836, 3837, 3838, 3840, 3841, 3842, 3843, 3844, 3845, 3847, 3848, 3849, 3850, 3851, 3855, 3856, 3857, 3861, 3863, 3864, and 3866.**

I.
FINDINGS OF FACT

Notices of Hearing were sent by the Department of Education to all Appellants, including Ms. Maureen Jacobson, Ms. Terri Kauer, Ms. Katherine Lenhart, and Mr. Jeffrey and Mrs. Nova Levine, by certified mail, return receipt requested. The Department has return receipt cards showing service of the Notice of Hearing on all Appellants, including Ms. Jacobson, Ms. Kauer, Ms. Lenhart and Mr. and Ms. Levine. Ms. Jacobson and the Levines filed voluntary dismissals of their appeals. Ms. Kauer and Ms. Lenhart did not appear at the hearing, did not send a representative, and did not move for a continuance.

All Appellants timely filed applications for their children to open enroll out of the Des Moines District to attend school elsewhere during the 1997-98 school year.

The District has a formally adopted open enrollment/desegregation policy and plan. The policy prohibits granting open enrollment when the transfer would adversely impact the District's desegregation plan. The policy contains objective criteria which the District uses to determine whether a request for transfer would adversely affect the desegregation plan. It also contains objective criteria the District uses to prioritize those requests for transfer deemed not to have an adverse impact on the desegregation plan.

The District determined eligibility or ineligibility of each applicant for open enrollment on a case-by-case basis pursuant to the District's open enrollment and desegregation policies. Each child's racial status was verified. Then the ratio of minorities to nonminorities at the child's attendance center was determined. It was then determined whether the child had siblings previously approved for open enrollment.

The District does not consider parents' reasons for requesting open enrollment. The application form does not provide a place for parents to state reasons, so the District does not know why parents requested open enrollment. If the parents attach information to the form regarding reasons for requesting open enrollment, the District considers those reasons to determine if the applicant meets the hardship exception contained in the District's open enrollment/desegregation policy. Several parents at the hearing expressed frustration at their inability to state a reason for requesting open enrollment on the form.

The application form for open enrollment is prepared by the State Department of Education, not by the local school district.

The District's open enrollment/desegregation policy (Policy Code No. 639) contains a hardship exception. The policy states as follows: "Hardships may be given special consideration. Hardship exceptions may include, but are not limited to, a change in a child's parent's marital status, a guardianship proceeding, adoption, or participation in

a substance abuse or mental health treatment program." The District interprets this exception narrowly. Dr. Jeschke testified that it includes things such as submission of a letter from a psychiatrist stating the child's presence in a particular setting would be detrimental. The policy including the hardship exception is sent to each family with the open enrollment application.

The Appellants in this case were not considered for hardship exceptions. The District did not know of their circumstances, since there was no place on the application form to state them, and no parent attached information to the form which the District could have evaluated.

All the Appellants are among the group of nonminority students deemed ineligible by the District for open enrollment because their transfer would adversely affect the District's desegregation efforts. The action to deny the applications for open enrollment was taken by the Des Moines Board at their meeting on January 21, 1997.

For the 1996-97 school year, minority enrollment in the Des Moines District was 25.2 %. In the portion of the District's desegregation plan at issue in this case, the District developed a composite ratio of minority to nonminority students for the district as a whole in the fall of 1996. The ratio is based on the district's official enrollment count taken in September. The district determined that since 25.2% of students in the District were minorities, and 74.8% of the students in the District were nonminorities, the composite ratio was 1:2.97 (74.8 divided by 25.2). The composite ratio is used to preserve the District's minority/nonminority student ratio. This means that for every minority student who open enrolls out of the District, 2.97 nonminority students will be granted open enrollment.

The parent determines the minority status of the child. In the application for open enrollment, parents are to check one of the following categories: white/not Hispanic, black/not Hispanic, Asian/Pacific Islander, Hispanic, or American Indian/Alaskan Native. All of the children of the appellants in this case are nonminority students. If there is a question regarding a child's race, the parent may be asked to verify the race of the child. Mr. Schumacher testified he and his wife believe their daughter is American Indian, but cannot verify her racial status at this time. Until verification is provided, she will be regarded as a nonminority student for purposes of this appeal.

Ten applications for open enrollment out of the District were submitted by minority students for the 1997-98 school year. Using the composite ratio of 1:2.97, the District determined that 29 nonminority students would be eligible for open enrollment for the 1997-98 school year. (10 x 2.97 = 29.7) The District has a policy of dropping down to

the next whole number, since there could not be .7 of a student. The only exception to this is if the last student on the list has a sibling requesting open enrollment, the sibling will be allowed to open enroll so as not to split the family.

There were 149 applications for open enrollment out of the District for the 1997-98 school year. Ten of these were minority applications. 139 were nonminority applications. 12 of these 139 nonminority applicants were determined to be ineligible for open enrollment under the building closed to open enrollment portion of the desegregation policy. This left 127 nonminority applicants to fill 29 allowable open enrollment slots.

The District has a policy which requires that students with siblings who are already open enrolled out of the District be allowed to open enroll first. There were 18 applicants with siblings who had previously been allowed to open enroll out of the District. This left 11 positions, and 109 applicants.

The District randomly assigned numbers to these remaining 109 applicants, with siblings being placed together, and they were placed on a list in numerical order. The first 11 children on the list were allowed to open enroll. The remainder of the students were placed on a waiting list. All of the Appellants in this case are on the waiting list, except for those Appellants deemed ineligible because their particular building was closed to open enrollment. The waiting list will be used only for the 1997-98 school year. If other minority students leave the District through open enrollment, the students at the top of the waiting list will be allowed to open enroll in numbers according to the composite ratio.

Based on the open enrollment/desegregation plan, the Board determined that transfer of these students on the waiting list out of the District would adversely affect the District's desegregation plan.

The District's practice of denying open enrollment applications under this composite ratio portion of its open enrollment/desegregation policy was upheld by Polk County District Court Judge Bergeson in his Ruling on Petition for Judicial Review, AA2432, filed June 1, 1995.

Parents may open enroll their children to another school within the District if they are unhappy with a particular attendance center, unless the building is closed to open enrollment under the District's policy. This provision would not allow nonminority students to exit or minority students to enter a particular building because the school's minority population exceeds the District's minority percentage by more than 15 percentage points. Thus, any building with a minority population of 40.2% or greater is closed to open enrollment. The only buildings closed to open enrollment for the 1997-98 school year are Brooks, Edmunds, King, Perkins, Lovejoy, McKinley, Moulton, Wallace, Harding, and Hiatt.

The children of three of the Appellants in this case were denied open enrollment because their particular buildings were closed to open enrollment due to the minority student percentage at the building. These Appellants were the Rings, Ms. Reelitz, and Ms. Saunders. Based on the open enrollment/desegregation plan, the Board determined that transfer of these students out of their assigned buildings (and then out of the District) would adversely affect the District's desegregation plan. This portion of the District's open enrollment/desegregation policy was upheld by the State Board of Education in In re Shawna and Joshua Barnett, 10 D. o. E. App. Dec. 35, and approved by Judge Bergeson in his Ruling.

Although parents may be denied open enrollment out of the District, they may still open enroll to another school within the District unless their child attends one of the buildings closed to open enrollment.

In re Katherine Ring

Mr. and Mrs. Ring applied for open enrollment to the Southeast Polk District for their daughter for the 1997-98 school year for the following reasons. Katherine will attend sixth grade at Hiatt Middle School in the Des Moines District in 1997-98. The Rings live in Pleasant Hill. At the time they built their house, they thought it was in the Southeast Polk District, but later found out it is four houses inside the Des Moines District boundary. The Rings have neighbors whose children attend Southeast Polk schools. Katherine would have to be bused to either Hiatt or Southeast Polk schools. The Rings live closer to Southeast Polk schools than to Hiatt. Traffic is less congested going to Southeast Polk. The Rings feel she would be safer on a bus going to Southeast Polk. Sixth grade is in middle school in the Des Moines District, and the Rings believe Katherine would benefit by remaining in elementary school for sixth grade. Sixth grade is in elementary school in the Southeast Polk District. Mrs. Ring has worked in the Des Moines schools, and has concerns about the safety of the building facilities in a number of the Des Moines schools. The Rings believe Katherine would do better in the Southeast Polk schools.

The Rings' application for open enrollment was denied because Hiatt is a building closed to open enrollment, and nonminority students are not allowed to transfer out of the building under the Des Moines District's open enrollment/desegregation policy.

In re Seth, Nikole, Brittni, and Jordan Reelitz

Ms. Reelitz applied for open enrollment to the Southeast Polk District for her children for the 1997-98 school year for the following reasons. The Reelitz children attend Catholic schools, and have never attended Des Moines public schools. If they attended Des Moines public schools next year, Seth and Nikole would be in 8th grade and

6th grade at Hiatt Middle School; Brittni would be 2nd grade at Pleasant Hill Elementary, and Jordan would be in kindergarten at Pleasant Hill Elementary. Ms. Reelitz is concerned about her children's safety if they attend Des Moines public school. Seth receives special accommodation from school because of difficulty, and Ms. Reelitz believes it would be detrimental to him to go to Hiatt. She has a number of concerns about Hiatt school. Ms. Reelitz is divorced. She was injured in a car accident, and has not been able to work since the accident about a year ago. The family is living with friends in Pleasant Hill. Ms. Reelitz can no longer afford to send her children to Catholic school. She would like her children to attend Southeast Polk schools because she believes they would be more like the Catholic schools her children are used to.

Seth and Nikole were denied open enrollment because Hiatt Middle School is closed to open enrollment, and nonminority students are not allowed to transfer out of the building pursuant to the Des Moines District's open enrollment/desegregation plan. Brittni and Jordan were denied open enrollment because the District determined that their transfer out of the District would adversely affect the composite ratio of minority to nonminority students for the District as a whole, also pursuant to the District's desegregation plan.

In re Jessica Saunders

Mr. and Mrs. Saunders applied for open enrollment for their daughter, who will be in sixth grade next year, for the following reasons. She would go to Hiatt Middle School in the Des Moines District. The Saunders do not believe their daughter would have the same educational opportunities in the Des Moines District which she would have in the Southeast Polk District. They believe Des Moines schools should concentrate more on "the basics". They do not agree with the new shorter hours and the position Des Moines has taken with respect to matters of sexual orientation. They do not believe sixth grade should be in middle school. They do not believe their daughter is mature enough to handle middle school. They do not believe Des Moines public schools can offer the quality of education they want for their child, and the recent budget cuts cause them to believe things will not get better. They are happy with the Des Moines Talented and Gifted program, and Jessica has participated in it. The Saunders' son received a head injury at school and was taken to the emergency room. The Saunders are upset because the school did not call them. (The Saunders are not applying for open enrollment for their son.) The Saunders are unhappy with the math textbook being used at Pleasant Hill Elementary.

The Des Moines District did not cut the hours of school for students, but shifted the start and end times of the school day.

The Saunders' application for open enrollment was denied because Hiatt is a building closed to open enrollment, and nonminority students are not allowed to transfer

out of the building under the Des Moines District's open enrollment/desegregation policy.

The following Appellants' children were denied open enrollment because the District deemed their transfer out of the District would adversely affect the District's desegregation plan because of the minority/non-minority composite ratio portion of the open enrollment/desegregation plan. All of these parents have the option of applying for within District open enrollment if they are unhappy with a particular school.

In re Jesse Bales

Mrs. Bales applied for open enrollment for her son, Jesse, into the Norwalk District for the 1997-98 year for the following reasons. She has three children: two daughters who graduated from Lincoln High School, and Jesse, who will be a sixth grader. Jesse would attend McCombs Middle School in the Des Moines District next year. Mrs. Bales fears for her son's safety if he attends Lincoln because of the experiences of her daughters. Her oldest daughter did not finish classes at Lincoln, because she observed three students snorting cocaine behind her at school. As a result, her life was threatened and her car was vandalized. Students also threatened the life of her little brother if she told what happened. Mrs. Bales went to the principal and school counselors to discuss the situation. Her daughter feared for her life and did not want to finish school at Lincoln, so Mrs. Bales put her at Des Moines Area Community College to finish high school. Mrs. Bales' second daughter was given a piece of gum laced with cocaine at school, and Mrs. Bales had to take her to the emergency room. She also feared retribution and dropped out of some activities she was in, but finished her classes at Lincoln. Mrs. Bales does not want her son exposed to these dangers. She realizes Norwalk schools will have problems with drugs, but believes they will be on a smaller scale than Lincoln. Mrs. Bales' parents live in Norwalk, and Jesse could go there after school until she could pick him up. She feels middle school students need after school supervision. If Jesse went to McCombs, he would not have this supervision.

In re Jordan Gillaspy

Ms. Boylan applied for open enrollment for her son to Delaware school in the Southeast Polk District for the 1997-98 school year for the following reasons. Jordan will attend second grade at McKee in the Des Moines District next year. Ms. Boylan's stepdaughter attends Delaware school, and Ms. Boylan has observed both Delaware school and McKee school. She feels the students at Delaware receive more individual attention, seem more advanced, and the school appears to be more organized and structured. Ms. Boylan's new babysitter lives in the Delaware District. It would be more convenient to attend school activities if Jordan attended the same school as his stepsister. Ms. Boylan's stepdaughter does not live with them.

In re Brooke Cosner

Ms. Cosner applied for open enrollment for her daughter Brooke who attends kindergarten at Pleasant Hill Elementary in the Des Moines District. Ms. Cosner would like Brooke to attend school in the Southeast Polk District for the following reasons. Her daycare provider's children attend school in the Southeast Polk District. Ms. Cosner works full time in West Des Moines. She would like her daughter to attend school with the babysitter's children so the babysitter could help with school activities. The Cosners are looking at homes in the Southeast Polk District, and would like to have Brooke move before she gets older.

In re Bradley Hess

Ms. Hess's son attends eighth grade at Goodrell Middle School in the Des Moines District. Brad is a special education student. Ms. Hess applied for open enrollment for her son to the Southeast Polk District for the following reasons. She requested a special education program. She does not want her son to attend East High School. She wants him in the best educational program she knows of, and she believes that is at Southeast Polk. Her landlord's son went to special education at Southeast Polk, and she knows it is one of the best programs around. In the past, he has been evaluated and sent to the school with the best educational program for him. In other schools in the Des Moines District, Ms. Hess has been very happy with the special education program offered to her son. He does better in a smaller setting. He is classified MD, BD, and LD. Mrs. Hess testified they have had a lot of problems at Goodrell. She stated the school does not contact her until a problem has reached its boiling point and Brad is in a lot of trouble. She also reported there have been gun threats directed at Brad at Goodrell. When Brad began attending Goodrell, he had trouble transitioning from a smaller school. Ms. Hess testified the principal's answer to this was to suggest they kick Brad out of school. Ms. Hess refused. She also testified the school denied Brad lunch because he did not have enough money in his lunch account. Brad takes medication which requires him to eat. She is concerned for her son's safety at East since he has certain disabilities. She wants her child to have the best chance to have a good education he can.

At the hearing, Ms. Hess was directed to the special education section of the Department of Education, since the hearing panel in this case does not have jurisdiction over the specifics of a student's special education program. The decision in this case is based solely on principles related to open enrollment from a district with a desegregation plan, and applies only to those aspects of the case.

In re Sean and Shelby Larson

Ms. Larson applied for open enrollment for her children to the Southeast Polk District for the following reasons. Sean attends fourth grade at Phillips Traditional School in the Des Moines District. Shelby is in kindergarten at the same school. They reside in the Douglas attendance area. Ms. Larson has serious concerns about the reading and math instruction Sean is getting at Phillips. She likes some aspects of the traditional school. Ms. Larson believes Sean is not ready for sixth grade at middle school, and the extra year in elementary school would help him.

In re Katie and Kelsie Long

Ms. Long applied for open enrollment for her daughters to the Southeast Polk District for the 1997-98 year for the following reasons. Katie attends fourth grade and Kelsie attends third grade at Pleasant Hill Elementary in the Des Moines District. Ms. Long is concerned about the class sizes at Pleasant Hill. The girls have over thirty children in their classes. Kelsie has reading and math problems. She has been working with a resource teacher which has helped. She reads at a first grade level. Ms. Long believes Kelsie needs a closed[1] classroom. She is easily distracted. Ms. Long believes Southeast Polk has a curriculum more in line with helping Kelsie get up to grade level. Kelsie has been going to a tutor. Ms. Long believes Kelsie is not mature enough to attend sixth grade in middle school. She wants to keep both girls together in the same district. The Longs live closer to Southeast Polk schools than to Hiatt. Ms. Long's son attended Hiatt, and there were a lot of discipline problems at Hiatt.

In re Kathryn and Sarah Lown

Mr. Lown and Ms. Diamond applied for open enrollment for their daughters to attend the Southeast Polk District for the 1997-98 year for the following reasons. Kathryn is a fourth grader and Sarah is a first grader at Pleasant Hill Elementary in the Des Moines District. Both children are in overcrowded classrooms, with 29 and 31 students. The parents believe the open[1] classrooms at Pleasant Hill are distracting. They believe Southeast Polk schools would give their children the best opportunity for a quality education. Mr. Lown's son attended King Elementary, which is an open-walled school, and he feels his son's education suffered as a result. Mr. Lown is familiar with Southeast Polk schools through his job, and is in a position to observe and judge what would be best for his daughters. They are happy with the Talented and Gifted program, but have concerns about the quality of the math curriculum offered at Pleasant Hill and the quality of teaching of math. Mrs. Diamond volunteers at Pleasant Hill, and is appalled because of

[1] Open and closed classrooms refer to whether the school building has walls which reach all the way to the ceiling surrounding each of the classrooms. An open classroom is one in which the walls are either nonexistent or reach only part way to the ceiling.
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the 31 students in the first grade class. She has contacted school authorities to try to correct this, and it has not been solved.

In re Jared Harridge

Ms. McCoy applied for open enrollment for her son Jared to the Southeast Polk District for the following reasons. Jared will be a ninth grader at East High School next year. Ms. McCoy has a daughter who attended East High School. Ms. McCoy saw she did not have good math skills. When Ms. McCoy discussed this with teachers at school, she was told this was all her daughter was capable of. When she went to college, Ms. McCoy's daughter was totally unprepared for what she needed to know. Ms. McCoy does not want to make the same mistakes with Jared. Jared is an intelligent and serious student. Jared's father attended Southeast Polk school district. Jared lives with his mother and she has custodial care. Ms. McCoy and Jared believe his educational and emotional needs would be met best in the smaller classrooms at Southeast Polk. They visited both schools. At an athletic event last fall at East, Jared observed a fight where a black student beat a white student, which was very disturbing to Jared. Ms. McCoy was actively involved at East when her daughter attended, and observed racial problems at the school.

In re Chris McDowell

Ms. McDowell applied for open enrollment for her son, who attends sixth grade at Hoyt Middle School, for the following reasons. She would like to open enroll Chris into the Southeast Polk District. She believes it was wrong to move sixth grade into middle school and ninth grade into high school in the Des Moines District. Going from elementary to middle school has been devastating for Chris. He is a very quiet and well-behaved student, and is a good student. Ms. McDowell does not want Chris to attend East High School. Ms. McDowell has been actively involved in her children's schools, and has been welcomed at prior schools. When Chris began Hoyt, Ms. McDowell was not welcomed there. Ms. McDowell went to school to eat lunch with her son. She was told this was middle school, we don't do these things anymore, and she should let him grow up. This embarrassed Chris in front of his friends. Ms. McDowell is concerned about the number of movies the children watch at Hoyt, and she is not sure there is a lot of education going on for Chris. As a parent, she wants what is best for her son. At Hoyt, there are open classrooms. This is distracting for Chris.

The McDowells are building a home in the Southeast Polk District, and they will move approximately July 31st. They have sold their home in Des Moines, and must move out May 31st. Mrs. McDowell applied for open enrollment to cover all bases. Once the McDowells move into their new home in the Southeast Polk District, Chris will be able to attend school in the district as a resident, and will no longer need to open enroll.

If a family has purchased a home in a new district and is in the process of moving, it may apply for an open enrollment waiver from both the receiving and sending districts. If both districts agree, the parents would not have to go through the open enrollment process. Ms. McDowell will pursue this.

In re Chelsea Miller

Ms. Miller applied for open enrollment for her daughter Chelsea for the following reasons. Chelsea attends third grade at Pleasant Hill Elementary. Ms. Miller would like her daughter to attend Southeast Polk schools. Pleasant Hill Elementary has open-walled classrooms. It also has combination classrooms, and the Des Moines District puts sixth grade into middle school. Southeast Polk schools are closed-wall classrooms, do not have combination classrooms, and sixth grade is in elementary school. Southeast Polk schools start at 8:40. Chelsea would catch the bus at 8:10. Pleasant Hill starts at 9:20. Ms. Miller drops her off at before school care at 7:30. This is a long time for Chelsea to wait for school to start. For these reasons, Ms. Miller believes her daughter would do better in the Southeast Polk schools.

Ms. Miller has a son who attends Goodrell Middle School and will attend East High School. They are very happy with Goodrell and look forward to his attendance at East. She will not seek open enrollment for him. Her request for Chelsea is based on her special needs.

Chelsea has been diagnosed with Attention Deficit Hyperactivity Disorder. Ms. Miller presented letters from both a psychologist and a psychiatrist which state that the open-walled classroom exacerbates Chelsea's symptoms, and which recommend she attend school in a closed-classroom situation in order to accommodate her special needs. Ms. Miller realizes there are schools in the Des Moines District with closed-wall classrooms, but believes it is very important for Chelsea to attend school with her peers. There are a number of children in the neighborhood who attend school in the Southeast Polk District. Chelsea has a good friend who was granted open enrollment to Southeast Polk schools for next year because she is a minority.

In re Kevin and Mikaela Nabity

Mr. and Mrs. Nabity applied for open enrollment for their children to the Southeast Polk District for the following reasons. Kevin is a fourth grader at Pleasant Hill Elementary. Mikaela will attend kindergarten next year at Pleasant Hill Elementary. The Nabitys want Mikaela to attend all-day kindergarten because she is a bright little girl who already knows how to read. All-day kindergarten is not available at Pleasant Hill. Although it is available at other schools in the Des Moines District, transportation to those schools is not provided, and the schools are not in the Nabity's neighborhood. The

Nabitys are concerned with the math book and program used at Pleasant Hill for Kevin. They are also concerned that test scores for Pleasant Hill students have been dropping. They do not believe their son is being challenged at Pleasant Hill. They are also very concerned about the test scores at Hiatt, where the children will attend middle school. They would like both children to attend school in the Southeast Polk District so they can walk to and from the bus stop together.

In re Tobias Ross

Ms. Ross' son Toby is a fourth grader at Pleasant Hill Elementary, and she would like to open enroll him to the Southeast Polk District for the following reasons. Ms. Ross has another son who attends East High, and she is not requesting open enrollment for him. However, she testified that when he attended Hiatt, the principal threw him against the wall and choked him for running in the hallway, which was very upsetting. She testified he was also thrown up against a wall by a teacher at East High. She believes the attitude at Hiatt and East is that the children are bad until proven good. In spite of this, her son is happy at East. She believes Southeast Polk has a broader curriculum and better sports programs than East.

Ms. Ross is not happy with the quality of instruction Toby is getting at Pleasant Hill. In third grade he was barely reading at a second grade level. In fourth grade he was reading at a third grade level. She took him to the Education Resource Center for testing. He attended classes at the Center, and improved his ability a great deal. This has improved his confidence. However, Ms. Ross feels she had to pay the Center to provide Toby with the education he is not getting at Pleasant Hill, and she feels he would do better at Southeast Polk. Ms. Ross does not believe it is good for Toby to be in open- walled classrooms, which they have at Pleasant Hill, and she is concerned about the overcrowded classrooms.

In re Michael Ruden

Ms. Ruden applied for open enrollment for her grandson Michael to the Saydel District for the following reasons. Ms. Ruden is the guardian of Michael. She babysits two other grandsons. Michael attended Headstart at Norwoodville. One of the other grandsons will attend Headstart at Norwoodville next year. Michael currently attends kindergarten at Adams Elementary this year. Ms. Ruden would like all her grandsons to attend the same school, which is possible only at Norwoodville since one grandson will attend the Headstart program there. Adams does not have a Headstart program. Ms. Ruden is not happy with Adams school and Michael's kindergarten teacher, and is concerned about the safety of the children when they are leaving the building because of the traffic. She is unhappy that Adams does not offer all-day kindergarten her grandsons could attend. Ms. Ruden has been told Michael will be held back and will have to repeat

kindergarten. She does not think this is justified. She was very pleased with Norwoodville when Michael attended there last year, and feels it would be the best school for all her grandsons.

One of the grandsons is T.J. Spencer, who attends Cornell School. T.J.'s mother has applied for open enrollment for him to attend Norwoodville as well. Since her grandsons would attend three different schools, it is very difficult for Ms. Ruden to drive them to and from school.

In order to alleviate her driving problem, Ms. Ruden could apply for within district open enrollment to some other school in the Des Moines District, and T.J.'s mother could apply for open enrollment for T.J. to the same school. This would mean Ms. Ruden would have to drive to two schools instead of three, since one grandchild will attend the Headstart program at Norwoodville.

In re Susan Ashley Schumacher

Mr. Schumacher applied for open enrollment for his step-daughter to the Johnston District for the following reasons. He has two other children, but is not applying for open enrollment for them. Susan Ashley attends eighth grade at St. Pius Catholic School. If she attended public school, Susan Ashley would attend Hoover High School next year. Mr. Schumacher testified he started hearing bad things about Hoover, so they would like her to attend Johnston High School. The Schumachers have heard there are drug problems and racial incidents between students at Hoover, which concern them. On the application for open enrollment, the Schumachers stated that Susan Ashley was American Indian/Alaskan Native. Mr. Schumacher testified they cannot prove her race, because Susan's biological father cannot prove his race. Susan's biological father believes his mother was American Indian, but cannot prove it. Therefore, the Schumachers cannot verify her racial status as a minority.

In re Jessica Sweet

Ms. Sweet applied for open enrollment for her daughter, who is an eighth grader at Hoyt, for the following reasons. She has two other children, but is only requesting open enrollment for Jessica. Jessica will attend East next year, and Ms. Sweet would like her to attend high school in the Saydel District. She is concerned about Jessica's safety at East. Jessica went to school in Tennessee through sixth grade. Ms. Sweet testified when the family moved to Des Moines, Jessica had already learned much of what was being taught in seventh grade. She has had three pre-algebra teachers this year. Ms. Sweet is not satisfied with the education Jessica has received so far. Ms. Sweet is happy with the education her middle child is receiving. She does not believe sending Jessica to East would be the best for her education or her safety. She has to go to work every day, and does not want to fear for her daughter's safety.

In re Raymond and Ryan Wilkins

Ms. Wilkins applied for open enrollment for her sons to the Southeast Polk District for the following reasons. The Wilkins live near Southeast Polk schools, and they are concerned with curriculum and class sizes in the Des Moines District. Ms. Wilkins is currently home schooling her sons. Prior to this year, they both went to McKee Elementary. Raymond would be attending Hoyt Middle School. Ms. Wilkins home schools her children because she felt Raymond was too young to attend middle school. Ryan has difficulty with reading, so she felt he would benefit from home schooling. Both boys are enrolled in the Des Moines Home Instruction Program, and Ms. Wilkins is very happy with the program. She has not decided for certain that she wants to stop home schooling, and may want to continue it next year. She wants to be able to choose the best schools for her sons, and believes they would do best in the Southeast Polk schools if she decides not to continue home schooling.

II.
CONCLUSIONS OF LAW

Ms. Jacobson, Ms. Kauer, Ms. Lenhart, and the Levines were properly served with Notice of the Hearing. They did not appear at the hearing, did not send a representative, and did not move for a continuance of the hearing. Ms. Jacobson and the Levines filed voluntary dismissals of their appeals. Therefore, the appeals for Ms. Jacobson, Ms. Kauer, Ms. Lenhart, and the Levines are hereby dismissed.

This case presents a collision of two very important interests: the right of parents to choose the school they feel would be best for their children under the open enrollment law, and the requirement that school districts affirmatively act to eliminate segregated schools. The Open Enrollment statute sets out these two interests, and provides as follows.

Iowa Code section 282.18(1)(1997) states, “It is the goal of the general assembly to permit a wide range of educational choices for children enrolled in schools in this state and to maximize ability to use those choices. It is therefore the intent that this section be construed broadly to maximize parental choice and access to educational opportunities which are not available to children because of where they live.”

Iowa Code section 282.18(3)(1997) states, “in all districts involved with voluntary or court-ordered desegregation, minority and nonminority pupil ratios shall be maintained according to the desegregation plan or order. The superintendent of a district subject to voluntary or court-ordered desegregation may deny a request for transfer under this section if the superintendent finds that enrollment or release of a pupil will adversely affect

the district's implementation of the desegregation order or plan. If, however, a transfer request would facilitate a voluntary or court-ordered desegregation plan, the district shall give priority to granting the request over other requests."

Iowa Code section 282.18(12)(1997) states, "The board of directors of a school district subject to voluntary or court-ordered desegregation shall develop a policy for implementation of open enrollment in the district. The policy shall contain objective criteria for determining when a request would adversely impact the desegregation order or plan and criteria for prioritizing requests that do not have an adverse impact on the order or plan."

Iowa Code section 282.18(18)(1997) states, "Notwithstanding the general limitations contained in this section, in appeals to the state board from decisions of school boards relating to student transfers under open enrollment, the state board shall exercise broad discretion to achieve just and equitable results which are in the best interest of the affected child or children."

As the parents in this case point out, the Open Enrollment Law gives parents a great deal of choice in the schools their children may attend. Originally enacted in 1989, the Open Enrollment Law has been amended several times, and has progressively given parents more and more ability to open enroll their children in the schools they prefer. In re Evan Wiseman, 13 D.o.E. App. Dec. 325. In fact, although parents are required to fill out an "application" for open enrollment, the term application is a misnomer, and the sending school district may not deny a timely-filed application, unless the transfer of the student will negatively impact the district's desegregation plan. Id. This is the reason the requirement that parents state a reason for the request on the application was taken out of the statute in 1996. Compare Iowa Code 282.18(2)(1995) with section 282.18(2)(1997).

In this case, the parents have important and valid reasons for requesting open enrollment for their children. We are very sympathetic to the difficulties encountered by families where both parents work. As was pointed out by several parents, good dependable childcare is critical to their children's well being, and is difficult to find, particularly for families with more than one child. The Des Moines District has developed before-and -after school care programs, which helps alleviate these problems, but daycare for half-day kindergarten students is not available. All-day kindergarten is offered by the District, but the number of children served is limited. We are also sympathetic to the parents who disagree with the District's placing sixth graders in middle school, and with those parents who have safety concerns for their children. Some of the parents had valid concerns about class sizes and instruction being offered to their children. These parents are genuinely interested in what is best for their children, and are seeking to obtain it by filing for open enrollment.

If the Des Moines District did not have a desegregation plan, there would be no question that these parents could open enroll their children as requested, so long as the applications were filed in a timely manner. However, the District does have such a plan. It contains the objective criteria required by Iowa Code section 282.18(12)(1997).

Segregation of children in public schools solely on the basis of race denies the children of the minority group equal protection of the law guaranteed by the Fourteenth Amendment of the U.S. Constitution, even when the physical facilities and other "tangible" factors are equal. Brown v. Bd. of Education of Topeka, 347 U.S. 483(1954)(Brown I). Race discrimination in public schools is unconstitutional. Brown v. Board of Education of Topeka, 349 U.S. 294(1955)(Brown II). School authorities have the primary responsibility to recognize, assess, and solve these problems. Id.

Sixteen years after Brown II, the U. S. Supreme Court stated very clearly that school districts must take affirmative steps to integrate their schools, when it said:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown II. That was the basis for the holding in Green [391 U.S. 430(1968)] that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch'. 391 U.S. at 437-38.
>
> If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1(1971).

State Department of Education rules require school boards to take affirmative steps to integrate students as a part of general accreditation standards. 281 IAC 12.1.

The Des Moines District developed its desegregation policy to conform to these requirements, to conform to the requirements of Iowa Code section 282.18(12)(1997), and to follow the State Board rule and guidelines on nondiscrimination. Current guidelines are contained in *The Race Equity Review Process*, adopted April 12, 1990. The District began desegregation efforts in 1967 with establishment of an Equal Educational Opportunity Committee. Desegregation Plan, A Blueprint for Integration, revised June 1993, at p.1; Des Moines Independent School District v. Iowa Dept. of Education, Ruling

on Petition for Judicial Review, June 1, 1995. In 1973, the District was notified by the Iowa Department of Public Instruction that 13 schools within the District were in violation of the State Guidelines on Nondiscrimination. Id. In 1974 and 1975, the federal government investigated the Des Moines District's desegregation/integration and nondiscrimination practices. Id. at p. 2. The U.S. Office of Civil Rights in Education issued a letter of noncompliance to the District as a result of the investigation. Id. The District settled the noncompliance by signing a Memorandum of Understanding with the U.S. Office of Civil Rights in Education, which was approved on November 16, 1976. Id. The Memorandum required the District to take affirmative steps to integrate schools in the District. Id. Among other things, the District committed to compliance with the State Guidelines on Non-Discrimination, which state that no school building may have a minority student population more than 20 percentage points above the district-wide minority student percentage. Id. The District currently has some buildings which are still not in compliance with the State Board Guidelines, and minority population in those buildings is greater than 20% above District-wide average percentages. Board Minutes, January 21, 1997.

The District's desegregation plan encourages and supports the elimination of factors which may cause the District's minority population to increase at a greater rate than that of surrounding suburban districts. Statistics show that while the percentage of minority students is increasing in the Des Moines District, it is remaining steady or decreasing in surrounding suburban districts. Id.; Des Moines Board Policy 639, Open Enrollment.

Between 1989 and 1993, open enrollment transfers out of the District increased the minority student percentage in the District. Of 572 students requesting open enrollment to surrounding districts, 535 (93.5%) were non-minority students, and 37 (6.4%) were minority students. (During the 1992-93 school year, there were 79.5% nonminority and 20.5% minority students in the District.) Id.

The District developed its open enrollment/desegregation policy in conformance with Iowa Code 282.18(12)(1997). The policy contains objective criteria for determining when open enrollment transfers will adversely impact the District's desegregation plan, and for prioritizing requests which will not adversely impact the plan as required by 282.18(12)(1997). Board Policy No. 639, Open Enrollment. Among other things, for buildings with a minority student population greater than 15 percentage points above the District's minority percentage, nonminority students may not transfer out of the building. This portion of the District's policy was upheld by the State Board of Education in In re Shawna and Joshua Barnett, 10 D.o.E. App. Dec. 35, and discussed and approved by Judge Bergeson in his Ruling on Petition for Judicial Review, Des Moines Independent School District v. Iowa Department of Education, June 30, 1995. The policy also contains a composite ratio provision, discussed above in the Findings of Fact, which is a

method of objectively determining when enrollment out of the District will have an adverse impact on the desegregation plan, and which contains the objective procedure by which student transfers deemed not to have an adverse impact will be prioritized. This provision was also upheld by Judge Bergeson in his Ruling.

Some of the parents raised the issue of reverse discrimination, and stated they and their children were being discriminated against because they were white, since the students would have been allowed to transfer out of the District if they were minorities. Judge Bergeson addressed this issue in his Ruling, and upheld the District's policy. The District's open enrollment/desegregation policy imposes race-conscious remedies to further its desegregation efforts. Use of race in this manner is not prohibited. Des Moines Independent School District v. Iowa Department of Education, Ruling on Petition for Judicial Review, June 30, 1995. The question to be asked is whether the classification "serves important governmental objectives" and is "substantially related to achievement of those objectives". Id. As Judge Bergeson found, the District's "interest in achieving and maintaining a racially integrated, diverse school system is compelling". Id. "The District is justified in implementing a desegregation plan given its history and its present inability to meet state nondiscrimination guidelines." Id. "The District's policy does not prefer one race over another. While the policy may have differing impacts, depending on the number and race of students applying for open enrollment, it does not prefer or advance one race over another." Id. The analysis to be used is to determine whether the policy is substantially related to an important governmental objective. Id. "[T]here are numerous benefits in operating a racially integrated school system", and "the District has a compelling interest in achieving and maintaining integration given the facts underlying this case." Id. The second part of the analysis is to determine whether the District's plan is substantially related to this compelling governmental interest. Id. Judge Bergeson found that the part of the District's policy which prevented minority students from transferring out of buildings with minority enrollments less than the District's average was not substantially related to the governmental interest. Id. However, he approved the finding by the State Board that closing buildings to transfer out by nonminority students when the building's minority population exceeds the District's by more than 15% is reasonable and sufficiently narrowly tailored. Id. He also upheld the District's composite ratio portion of the policy. Id.

The circumstances have not changed since Judge Bergeson's Ruling two years ago. The District continues to have buildings with minority percentages more than 20% above District percentages, and the minority population of the Des Moines District remains significantly higher than that of surrounding districts. Therefore, the compelling governmental interest of the District remains, the remedies upheld by Judge Bergeson as substantially related to the important governmental interest are the same, and the allegations of reverse discrimination by some of the parents therefore fail.

Some of the parents questioned how transfer of their children could impact the District's desegregation plan, since their children attend private schools. This issue was addressed in In re David Early, 8 D.o.E. App. Dec. 206, 213-214 (1991). In that case, the State Board stated: "If we were to release all students whose parents had placed them in private schools or paid tuition to attend in another district, we would be sending the message that the way to avoid being 'trapped' in a desegregation district is to pay tuition elsewhere for one year, then you can use open enrollment. This would be a bad message to send, it would affect only those financially able to afford private or nonresident public school tuition, and it would be ignoring the District's good faith efforts to desegregate its system." In this case, the parents were not trying to circumvent the desegregation plan by enrolling their children in private schools. However, the good intentions of these particular parents do not mean that the State Board or the District should create a loophole which could gut the District's desegregation efforts. In addition, the District uses the entire student population in an attendance area, not just students who actually attend, to make planning and staffing decisions. Therefore, the District correctly determined that even though these children have been attending private schools, their transfers out of the District could negatively impact the District's desegregation plan.

With respect to the students involved in this case, the District followed its open enrollment/desegregation policy, and determined that transfers of the students at issue in this case would have an adverse impact on the desegregation policy. We agree with that determination.

Some of the parents raised the issue that application of the desegregation plan restrictions is unfair, because if they could afford to pay out of district tuition, they could exit. Therefore, they argue, "white flight" is available to those who can afford to pay for it. We agree that this is unfair. However, Iowa law has always allowed parents who paid tuition to send their children to school in any district. This was the state of the law prior to the existence of the open enrollment statute. The open enrollment statute equalizes the situation in most cases, because most districts do not have a desegregation plan. Allowing parents to leave a district with a desegregation plan, and thereby negatively impact the desegregation plan, is not justified by the unfairness of wealthier parents being able to pay for their children to exit the District. It is also not in accordance with Iowa Code section 282.18(3)(1997).

Thus we have a conflict between the right of parents to choose their children's schools, and the constitutional requirement of integration and the obligation of the District to implement it. Some of the parents state that their children's best interest should override the District's composite ratio, and point to Iowa Code section 282.18(18)(1997), which states that "Notwithstanding the general limitations contained in this section, in appeals to the state board from decisions of school boards relating to student transfers under open enrollment, the state board shall exercise broad discretion to achieve just and

equitable results which are in the best interest of the affected child or children". Section 282.18(1) states the intent to construe the open enrollment statute broadly to "maximize parental choice and access to educational choices not available to children because of where they live". These two sections of the Open Enrollment statute are in conflict with section 282.18(3), which states that in districts with desegregation plans, nonminority and minority pupil ratios are to be maintained according to the plan, and districts may deny requests for open enrollment if the transfer would adversely impact the desegregation plan.

The question presented is whether the provisions of the statute which provide for parental choice and State Board discretion override that provision which allows a district to deny open enrollment if it finds the transfer would adversely impact the district's desegregation plan. While Judge Bergeson's Ruling seems to indicate they do not, the Judge did not specifically address the question. Therefore, we do so here.

When determining the meaning of a statute, we first must decide if it is ambiguous. If it is not, we apply the plain meaning of the statute. In this case, the individual sections of the statute are not ambiguous when considered separately. However, when they are considered together, the ambiguity arises. The sections of the statute conflict. Therefore, we apply the rules of statutory construction. Citizen's Aide/Ombudsman v. Miller, 543 N.W.2d 899, 902 (Iowa 1996).

If a general provision of a statute conflicts with a special provision, the provisions are to be construed to give effect to both if that is possible. If it is not, the special provision prevails as an exception to the general provision. Iowa Code section 4.7 (1997). In this case, sections 282.18(1) and 282.18(18) apply generally to all open enrollment cases. Section 282.18(3) applies only to those districts which are subject to voluntary or court-ordered desegregation plans. It is not possible to reconcile these provisions to give effect to both. Either the parents and the State Board are given broad discretion to choose the school district for these children, or the Des Moines District is allowed to deny their requests for open enrollment because their leaving the District would have an adverse impact on the District's desegregation plan. Therefore, under this rule of statutory construction, section 282.18(3) would prevail only as to those districts subject to a desegregation plan. This is an exception to the general rule, which is that parents are given wide choice as to schools (282.18(1)), and that in appeals to the State Board, the State Board is to exercise broad discretion to achieve just and equitable results in the best interest of the affected child or children (282.18(18)).

On the other hand, there is a second rule of statutory construction, which states that "If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails." Iowa Code section 4.8. In this case, the open enrollment statute was enacted in 1989, and

included both 282.18(1) and a predecessor to 282.18(3). The language which allows a district to deny open enrollment if there is an adverse impact on the desegregation plan was added in the 1991 Code. Section 282.18(18) was not added until 1992. According to this rule of statutory construction, the State Board's broad authority to exercise discretion contained in 282.18(18) would prevail over section 282.18(3).

However, in matters of statutory construction, Iowa Code section 4.7 overrides Iowa Code section 4.8. Citizen's Aide/Ombudsman v. Miller, 543 N.W.2d 899, 903 (Iowa 1996). "[A] specific statute is not controlled or nullified by a general statute, and the more specific statute is given precedence over the more general one, regardless of priority of enactment, absent clear intention otherwise." Laird v. Ramirez, 884 F.Supp. 1265, 1275 (N.D.Iowa 1995).

Therefore, section 282.18(3), which specifically says that districts subject to desegregation plans may deny open enrollment if the transfer would negatively impact the desegregation plan, prevails in this case. The Des Moines District had the authority to deny open enrollment to these students, because their transfer out of the District would negatively impact the District's desegregation plan.

The District's Open Enrollment/Desegregation Policy No. 639 contains a hardship exception, which was discussed above in the Findings of Fact. It appears that Chelsea Miller may meet the hardship exception in the District's policy as testified to by Dr. Jeschke. The District did not have the information shown at the hearing to evaluate whether Chelsea meets the hardship exception at the time it evaluated her application, because there is no space on the application form to give reasons for the request. The District must use application forms prepared by the State Department of Education. Iowa Code section 282.18(2)(1997). Those forms do not have space for a reason, because the legislature eliminated the requirement to state a reason in 1996. Compare Iowa Code 282.18(2)(1995) with 282.18(2)(1997). The reason this change was made is because in districts without a desegregation plan, the parent's reason for requesting open enrollment is irrelevant, and open enrollment must be granted by the sending district so long as the application is timely filed. In the case of a district such as Des Moines, which has a desegregation plan and a hardship exception, lack of space on the form means the District does not get the information it needs to evaluate whether a hardship exists. There are very few districts in Iowa which have a desegregation plan and a hardship exception. Therefore, it does not make sense, and would be confusing, to change the form. However, there is nothing in the statute which would prevent the Des Moines District from creating a supplemental form specifically designed to gather information relevant to the hardship exception which it needs to make the hardship determination.

Since the District never had the information, it never had the opportunity to evaluate Chelsea Miller's case to determine whether she met the hardship exception. Therefore, we recommend her case be remanded to the District to determine whether she meets the hardship exception. We also recommend the District be asked to inform the State Board of its determination. In remanding the Miller case, the State Board makes no finding regarding whether Chelsea's case meets the hardship exception. In fact, it appears to the State Board that the problems identified by Chelsea's psychiatrist and psychologist may be able to be met by within-district open enrollment. However, the District has never had the opportunity to make the decision, and therefore, we recommend the case be remanded.

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Des Moines Independent Community School District made on January 21, 1997, which denied the appellants' request for open enrollment for their children for the 1997-98 school year, on the grounds the transfers would adversely impact the District's desegregation plan, is hereby recommended for affirmance, with the exception of **In re Chelsea Miller**, which is recommended for remand to the District for a determination of applicability of the hardship exception. The District is requested to inform the State Board of its determination. There are no costs of this appeal to be assigned.

_____ _____

DATE

AMY CHRISTENSEN, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

_____ _____

DATE

CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION