IOWA STATE BOARD
OF EDUCATION
(Cite as 16 D.o.E. App. Dec. 9)

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

These cases were consolidated and were heard together on April 30, 1998, before a hearing panel comprising Dr. Gary Borlaug, Bureau of Practitioner Preparation and Licensure; Mr. Myril Harrison, Bureau of Technical & Vocational Education; and Amy Christensen, J.D., designated administrative law judge, presiding. The following Appellants were present: Mrs. Lois and Mr. Jeffrey Duncan, Mr. Christian and Mrs. Kelly Graf, Ms. Chris Heimke, Mrs. Andrea and Mr. William Jors, Ms. Terri Kauer, Mr. Matthew and Mrs. Billi Jo Litzenberg, Mr. Jon Petersen, Ms. Patti Petersen, Ms. Joy Purscell representing Mr. Benjamin Jay Purscell, and Ms. Dianna Wallace. Appellants Ms. Annette Behle and Ms. Linda Northway 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 also unrepresented by counsel.

An evidentiary hearing was held pursuant to departmental rules found at 281 Iowa Administrative Code Ch. 6. Authority and jurisdiction for the appeals are found at Iowa Code sections 282.18 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 the decisions of the Board of Directors [hereinafter, "the Board"] of the District made on January 20, 1998, February 17, 1998, March 17, 1998, and April 7, 1998, which denied their applications for open enrollment out of the District, beginning in the 1998-99 school year. The applications were denied on the basis that the exit of these students from the District would adversely affect the District's desegregation plan.

***"*et al.*" means "and others."**
****Adm. Doc. #s 3951, 3954, 3957, 3958, 3960, 3961, 3968, 3971, 3975, 3983, and 3990.**

I.
FINDINGS OF FACT

The Department of Education sent Notices of Hearing to all Appellants, including Ms. Annette Behle and Ms. Linda Northway, by certified mail, return receipt requested. The Department has return receipt cards showing service of the Notice of Hearing on all Appellants, including Ms. Behle and Ms. Northway. Ms. Behle and Ms. Northway 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 1998-99 school year.

In re Samuel Duncan

Mr. and Mrs. Duncan applied for open enrollment to the Johnston District for their son, Samuel, for the 1998-99 school year for the following reasons. If he attends public school in the Des Moines District next year, Samuel will attend kindergarten at Hillis Elementary School. The Duncans live in Des Moines, and both parents work. Samuel has attended daycare at La Petite Academy in Johnston for four years, and the Duncans would like him to stay there for his before and after school care. La Petite transports children to schools in Johnston, but not to schools in Des Moines. La Petite is convenient to Mrs. Duncan's job. She would also be closer to Samuel if he attended school in Johnston in case there were an emergency.

The District denied the Duncans' application for open enrollment pursuant to the composite ratio part of the desegregation plan. The decision was made at the February 17, 1998 Board meeting.

The Duncans believe the denial of their application was unfair and discriminatory because if they could afford to pay tuition to Johnston, Samuel could leave the District. They are also concerned that the District uses enrollment figures for this year to project what they will be next year, and bases its decisions on this year's figures.

In re Nicholas Graf

Mr. and Mrs. Graf applied for open enrollment to the Urbandale District for their son, Nicholas, for the 1998-99 school year for the following reasons. If he attends public school in the Des Moines District next year, Nicholas will attend kindergarten at Windsor Elementary School. The Grafs live in Des Moines, and both parents work. Nicholas and his younger sister attend daycare, and the Grafs would like the children to stay there, with Nicholas being cared for before and after school. The daycare transports children to and from Olmsted School in Urbandale, but not to schools in Des Moines. It is also

conveniently located with respect to both parents' employment. Nicholas has friends in daycare, and the Grafs believe it would be best for him to begin school with his friends, rather than going to school where he does not know anyone. If he cannot attend school in Urbandale, the Grafs will have to change daycare for both Nicholas and his sister, and they believe it would be detrimental to both children to do so.

The District denied the Grafs' application for open enrollment pursuant to the composite ratio part of the desegregation plan. The decision was made at the February 17, 1998 Board meeting.

The Grafs question how the District can make decisions without first seeing the enrollment figures for the 1998-99 school year. They question the District's finding of adverse effect based only on the current ratio of minority to nonminority students. They question how the District can apply its hardship exception when there is no space on the form to indicate hardships. They also question the fairness of the random selection process. They argue that the district's desegregation plan thwarts the intent of the open enrollment law.

In re Devin Heimke

Ms. Heimke applied for open enrollment to the Johnston District for her son, Devin, for the 1998-99 school year for the following reasons. If he attends public school in the Des Moines District next year, Devin will attend kindergarten at Rice/Monroe Elementary School. Ms. Heimke and Devin live with her parents in Des Moines. She is a single parent, and works as the Director of the La Petite Academy in Johnston. Her normal work schedule is 9:00 a.m. to 6:00 p.m., although she occasionally must be at work as early as 6:30 a.m. One of her job benefits is free daycare for Devin. He has attended daycare at La Petite with his mother his entire life. She would like him to continue there with his friends. If Devin cannot attend school in Johnston, Ms. Heimke will have to find other daycare for him. La Petite transports children to schools in Johnston, but not to schools in Des Moines. This will be a great financial burden to her, it would be a problem if there were an emergency at school, and she also believes the change would not be good for Devin.

The District denied Ms. Heimke's application for open enrollment pursuant to the composite ratio part of the desegregation plan. The decision was made at the January 20, 1998 Board meeting.

In re Tanner Goldsberry-Jors

Mr. and Mrs. Jors applied for open enrollment to the Saydel District for their son, Tanner, for the 1998-99 school year for the following reasons. If he attends public school in the Des Moines District next year, Tanner will attend kindergarten at McKee

Elementary School. The Jors live in Des Moines, and both parents work. Tanner attends daycare, and most of his friends will go to school in Saydel. Tanner's daycare will transport him to and from school at Cornell Elementary and Saydel schools. Mr. and Mrs. Jors believe Tanner will be very upset if he cannot go to school with his friends. The Jors plan to move to Saydel in the near future, and always planned to have their children attend school in Saydel since Mr. Jors went to school there.

The District denied the Jors' application for open enrollment pursuant to the composite ratio part of the desegregation plan. The decision was made at the January 20, 1998 Board meeting.

Mr. Jors stated that the District's minority percentage has been rising, and this is not due to a decrease in non-minority students from open enrollment, but rather because more minority students are moving into the District. Therefore, he states that the District's minority percentage will continue to rise regardless of what the District does to restrict open enrollment. He also points out that with the continued rise in minority student population, fewer and fewer non-minorities will be able to leave the District through open enrollment.

In re Christopher Kauer

Ms. Terri Kauer and Christopher live in the Des Moines District. Ms. Kauer applied for open enrollment to the West Des Moines District for her son, Christopher, for the 1998-99 school year for the following reasons. If he attends public school in the Des Moines District next year, Christopher's assigned school for kindergarten will be Douglas Elementary School. Douglas has no all day kindergarten. Therefore, since Metro Kids Care only operates before and after the full school day, Ms. Kauer does not have daycare for him if he attends kindergarten at Douglas. Christopher goes to daycare in West Des Moines, and he could stay there and attend school in West Des Moines. Ms. Kauer's application is only for Christopher's kindergarten year, and she plans to have him attend school at Douglas next year for first grade and use the Metro Kids Care program.

The District denied Ms. Kauer's application for open enrollment pursuant to the composite ratio part of the desegregation plan. Therefore, Ms. Kauer has the option of applying for within District open enrollment so Christopher could attend a school with all day kindergarten in the Des Moines District. The decision to deny open enrollment was made at the March 17, 1998 Board meeting.

Ms. Kauer questioned whether the deadline for applications for parents of kindergarten students is January 1st or June 30th. She also pointed out the difficulty for kindergarten parents when the District only offers half-day kindergarten without available daycare for those students. Mr. Jeschke testified the District is planning to expand the all-day kindergarten program, but this will not be done at Douglas Elementary for the 1998-99 school year.

In re Kristen Litzenberg

Mr. and Mrs. Litzenberg applied for open enrollment to the S.E. Polk District for their daughter, Kristen, for the 1998-99 school year for the following reasons. If she attends public school in the Des Moines District next year, Kristen's assigned school for kindergarten will be Wallace Elementary School. The Litzenbergs would like Kristen to attend kindergarten at the same school her sister attends, which is Four Mile Elementary in the S.E. Polk District. Kristen's daycare provider also lives in the S.E. Polk District, and it would be a hardship for the family to arrange for transportation to and from school in Des Moines. The Litzenberg family moved into the Des Moines District in the fall of 1997. Since Kristen's sister had already attended school in the S.E. Polk District, she was allowed to continue attending the same school under the continuation part of the open enrollment law. Since Kristen has never attended school in the S.E. Polk District, the continuation part of the law does not apply to her. The Litzenbergs would like Kristen to attend full day kindergarten, which is available in the S.E. Polk District, but not at Wallace Elementary. They believe this presents a better educational opportunity for her.

Wallace Elementary has a minority enrollment of 50.6%. Therefore, the District closed it to open enrollment for the 1998-99 school year, because its minority enrollment is more than 15 percentage points over the District's average minority enrollment of 26%. The District denied the Litzenbergs' application for open enrollment pursuant to the building specific part of the desegregation plan. The decision to deny open enrollment was made at the January 20, 1998 Board meeting. Since Kristen's assigned building is one closed to open enrollment, the sibling preference policy in the District's desegregation plan is not available to her.

The Litzenbergs testified that when they called Sunny in the Des Moines open enrollment office, she told them she did not see any problem with their application, since Kristen's sister already attended S.E. Polk schools. From the testimony at the hearing, we do not know whether Sunny understood Kristen's sister was attending under continuation, and we do not know whether she understood Kristen's assigned school was one closed to open enrollment. The Litzenbergs are unhappy that the District uses the desegregation plan to deny them open enrollment, and argue that the District is discriminating against them because they are white.

In re Austin Petersen

Austin's parents are Mr. Jon Petersen and Ms. Patti Petersen. The Petersens have been divorced for about two years. Mr. Petersen lives in Adel. Ms. Petersen and Austin live in the Des Moines District. The Petersens applied for open enrollment to the West Des Moines District for their son, Austin, for the 1998-99 school year for the following reasons. If he attends public school in the Des Moines District next year, Austin's

assigned school for kindergarten will be Hillis Elementary School. Both of Austin's parents work full time. Mr. Petersen works in Adel, and has a twenty-four hour rotating work shift. Ms. Petersen works 7 a.m. to 5 p.m., and she cannot leave work to transport Austin to and from school.

Austin has attended La Petite daycare in West Des Moines for four years. The staff is familiar to him and he has good friends there. Since Mr. and Ms. Petersen divorced, Austin and his mother have moved several times. The Petersens believe it would be much less stressful for Austin to continue daycare where he is familiar so he has stability and constancy. They are happy with the care Austin receives at La Petite. Also, La Petite will transport Austin to school in West Des Moines, but will not do so to Hillis Elementary.

The District denied the Petersens' application for open enrollment pursuant to the composite ratio part of the desegregation plan. Therefore, the Petersens have the option of applying for within District open enrollment so Austin could attend a different school within the Des Moines District. The decision to deny open enrollment was made at the January 20, 1998 Board meeting.

In re Benjamin Reed McClure

Mr. Benjamin Purscell is Benjamin McClure's father. He is a single parent, and has had custody since December of 1995. Benjamin's mother lives in Des Moines. She has visitation every other weekend, and two evenings in alternating weeks. Mr. Purscell and Benjamin live in Pleasant Hill in the Des Moines District. Mr. Purscell's mother, and Benjamin's grandmother is Ms. Joy Purscell. She and her husband live in the S.E. Polk District. Since Mr. Purscell had to work, his mother represented him at the hearing.

Mr. Purscell applied for open enrollment to the S.E. Polk District for his son, Benjamin, for the 1998-99 school year for the following reasons. If he attends public school in the Des Moines District next year, Benjamin's assigned school for kindergarten will be Pleasant Hill Elementary School. Mr. Purscell's hours at work vary. Usually he must be at work by 6:30 a.m., and gets off at 5 or 5:30 p.m. Ms. Purscell watches Benjamin while Mr. Purscell is at work. Mr. Purscell must work out of town often. When he is called out of town to work, it is with short notice, and he must be gone several days to a week. When Mr. Purscell is called out of town, his mother takes care of Benjamin. Ms. Joy Purscell currently works nights. When she is at work, and Benjamin is at her house, her husband takes care of Benjamin. Ms. Purscell testified Benjamin is with her more than he is with either of his parents. A bus to the S.E. Polk schools stops right in front of Ms. Purscell's home, and could pick up Benjamin if he attended school in the S.E. Polk District. Benjamin has friends in her neighborhood. Ms. Purscell does not know how she would be able to transport Benjamin to school if he must go to school in Des Moines.

The District denied Mr. Purscell's application for open enrollment pursuant to the composite ratio part of the desegregation plan. Therefore, he has the option of applying for within District open enrollment so Benjamin could attend a different school within the Des Moines District. The decision to deny open enrollment was made at the February 17, 1998 Board meeting.

In re Tanner King

Ms. Dianna Wallace is Tanner King's grandmother and legal guardian. Ms. Wallace, Tanner, and Tanner's sister live in the Des Moines District. Ms. Wallace applied for open enrollment to the Saydel District for her grandson, Tanner, for the 1998-99 school year for the following reasons. If he attends public school in the Des Moines District next year, Tanner's assigned school for kindergarten will be Madison Elementary School. Tanner's mother was incarcerated about one and one-half years ago, and Ms. Wallace has been Tanner's and his sister's legal guardian since then. Both children have attended daycare with a very reliable babysitter in the Saydel District for approximately the last two years. They are at daycare for about twelve to fourteen hours per day while Ms. Wallace works. Ms. Wallace has two jobs, one of them working for the Saydel District. Tanner's sister attends Head Start in the Saydel District. Ms. Wallace does not want the children's lives to be disrupted by having to change daycare, which they would have to do if Tanner must attend school in Des Moines. Ms. Wallace points out the children have suffered enough hardship without having to be separated from their current daycare provider. In addition, Ms. Wallace's home is too small, and she will soon be moving to the Saydel District, so she would like Tanner to begin school there so he does not have to change schools once they move. Dr. Jeschke testified that if Ms. Wallace has a contract to purchase a home, and shows it to the Des Moines District, the District would allow Tanner to begin school in the new district.

The District denied Ms. Wallace's application for open enrollment pursuant to the composite ratio part of the desegregation plan. The decision to deny open enrollment was made at the April 7, 1998 Board meeting.

Ms. Wallace questions how children are counted as residents of the District, and why Tanner's absence would have any effect on the desegregation plan, since he has never attended school in the District.

The District

The District has a formally adopted open enrollment/desegregation policy and plan. The District states the following in Policy Code 639 Open Enrollment:

> Diversity is a key component of a quality education. School experience for non-minority and minority youngsters sets the pace for cross-cultural relationships and non-discrimination that lasts a lifetime. Young persons are far better prepared for the future if they attend school in a diverse setting reflective of the diversity of society. Understanding similarities and understanding differences in individuals as well as cultures and backgrounds is not only healthy for the individual student but also for the entire community. Diversity enriches the educational climate in the school. All aspects of education — history, literature, language, etc. — are enhanced by different viewpoints and by different perspectives which racial and ethnic diversity bring to the discussion. Thus, diversity is deemed to be a major component of quality education in the District.

The open enrollment/desegregation policy and plan 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. The policy contains two parts it uses to determine adverse effect on the District's desegregation plan. First, the District identifies particular schools where transfer of minority or nonminority students would have an adverse effect because their leaving the building would increase racial isolation of the building. Those particular buildings are closed to open enrollment. Second, the District develops a composite ratio of minority to non-minority students, which it uses in an attempt to preserve the District's existing minority/nonminority ratio. The policy 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. The ratio of minorities to nonminorities for the District as a whole was determined. Finally, the District 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. The application form for open enrollment is prepared by the Iowa Department of Education, not by the local school district. Dr. Jeschke testified that treating all applicants alike is the fairest way to administer the system, because it would be impossible to judge which applicant's reason

for open enrollment was the best reason. Dr. Jeschke testified that all of the parents had valid reasons for seeking open enrollment, so the random selection process is the fairest way to choose who may leave and who may not.

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 Appellants in this case were not considered for hardship exceptions, since none of them attached information to the form that the District could have evaluated.

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.

All of the Appellants' children 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 plan. The actions to deny the applications for open enrollment were taken by the Des Moines Board at its meetings on January 20, 1998, February 17, 1998, March 17, 1998, and April 7, 1998.

The first part of the District's open enrollment/desegregation policy and plan does not allow nonminority students to exit a particular building if the building's minority population exceeds the District's minority percentage by more than 15 percentage points. The percent of minority students in the District in the 1997-98 school year is 26%. The District uses this year's minority percent to estimate what next year's minority enrollment will be in any particular building. Thus, any building with a minority population of 41% or greater this year is closed to open enrollment next year. The buildings closed to open enrollment for the 1998-99 school year are Brooks, Edmunds, King, Perkins, Longfellow, Lovejoy, McKinley, Moulton, Wallace, Harding, and Hiatt.

Two children of the Appellants in this case were denied open enrollment because their particular building, Wallace Elementary, was closed to open enrollment due to the minority student percentage at the building. These children were Kristen Litzenberg and Ashley Northway. Based on the open enrollment/desegregation plan, the Board determined that transfer of these students out of their assigned building (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 on Petition for Judicial Review, AA2432, filed June 1, 1995, Des Moines Independent Community School District v. Iowa Dept. of Education.

The second part of the District's open enrollment/desegregation policy and plan uses a ratio of minority to nonminority students for the District as a whole to determine when exit of students would adversely affect the District's desegregation plan. The remaining Appellant's children were denied open enrollment under this part of the desegregation plan. During the 1997-98 school year, minority enrollment in the Des Moines District is 26%. The District developed a composite ratio of minority to non-minority students for the district as a whole in the fall of 1997. The ratio is based on the district's official enrollment count taken in September. The district determined that since 26% of students in the District were minorities, and 74% of the students in the District were nonminorities, the composite ratio was 1:2.85 (74 divided by 26). The composite ratio is used to try to preserve the District's minority/nonminority student ratio. This means that for every minority student who open enrolls out of the District, 2.85 non-minority students will be granted open enrollment for the 1998-99 school year.

Thirteen applications for open enrollment out of the District were submitted by minority students for the 1998-99 school year. Using the composite ratio of 1:2.85, the District determined that 37 nonminority students would be eligible for open enrollment for the 1998-99 school year. (13 x 2.85 = 37.05) The District has a policy of dropping down to the next whole number. 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 136 applications for open enrollment out of the District for the 1998-99 school year. Thirteen of these were minority applications. 123 were nonminority applications. 18 of these 123 nonminority applicants were determined to be ineligible for open enrollment under the building closed to open enrollment portion of the desegregation policy. This left 105 nonminority applicants to fill the 37 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, unless they are from a building closed to open enrollment. If a student will attend a building closed to open enrollment, there is no sibling preference policy. There were nine applicants with siblings who had previously been allowed to open enroll out of the District, who were not from buildings closed to open enrollment, and who were nonminority students. This left 28 positions, and 96 applicants.

The District used a computer program to randomly assign numbers to these remaining 96 applicants, with siblings being placed together, and they were placed on a list in numerical order. The first 28 children on the list were allowed to open enroll. The remaining students were placed on a waiting list. Kindergarten students who applied for open enrollment after January 1st were placed at the end of the waiting list, unless they were assigned to a building closed to open enrollment. Except for the two students ineligible to leave Wallace Elementary, the children in this case were placed on the waiting list. The waiting list will be used only for the 1998-99 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 the 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 the 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.

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.

If parents want their child to attend school out of the District, and are turned down for open enrollment, they may pay tuition to the receiving district and have their child attend there, thus circumventing the open enrollment process and the desegregation plan. (This assumes the receiving district does not deny the application for insufficient classroom space.)

The deadline for parents of kindergarten students to apply for open enrollment is June 30th. However, the District encourages kindergarten parents to apply by January 1st, because the District determines which students may exit the District under the desegregation plan in the month of January. Assuming the student is not assigned to a building closed to open enrollment, if a parent of a kindergarten student applies after this determination is made, the student will be placed at the end of the waiting list for open enrollment. Therefore, unless a student is assigned to a building closed to open enrollment, it is to kindergarten parents' advantage to apply prior to January 1st, even though it is not required.

II.
CONCLUSIONS OF LAW

Ms. Annette Behle and Ms. Linda Northway were properly served with the Notice of Hearing. They did not appear at the hearing, did not send a representative, and did not move for a continuance of the hearing. Therefore, the appeals for Ms. Behle and Ms. Northway are hereby dismissed.

Two very important interests conflict in this case: 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, and single parent families when the single parent must work. Transporting children to and from school can be a major problem for these families. 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. The District offers all-day kindergarten, but the number of children served is limited. We also recognize the value of having siblings remain together in the same district. 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 Iowa Department of Public Instruction notified the District 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 that 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 20, 1998.

Dr. Jeschke testified that the District's minority enrollment percentage continues to increase each year. As Mr. Jors pointed out, some of the increase in minority enrollment percentages in the District has nothing to do with open enrollment of non-

minorities out of the District. This does not lessen the validity of evidence that open enrollment of nonminorities out of the District has also had an impact. Judge Bergeson stated the following in his Ruling at page 10: "In addition to changing population and demographics, open enrollment out of the District has been cited as a factor contributing to the disparity in minority enrollment percentages between neighboring districts and the increasing minority percentage in the District."

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, which is a method of objectively determining when enrollment out of the District will have an adverse impact on the desegregation plan. It also contains the objective procedure (the computer random selection process) 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 question the validity of using this year's enrollment figures as a basis for deciding which buildings will be closed to open enrollment next year, and as a basis for determining the number of nonminority students allowed to open enroll next year under the composite ratio part of the plan. 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 for the following year 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, which used one year's enrollment figures to determine the number of non-minority students allowed to open enroll the following year. 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 invalidity of using this year's enrollment figures for 1998-99 desegregation decisions and reverse discrimination by some of the parents therefore fail.

Some of the parents questioned how transfer of their children could negatively impact the District's desegregation plan, since their children will attend kindergarten next year, and have never attended school in the District. The District uses the entire student population in an attendance area, not just students who actually attend, to make planning and staffing decisions. These students are residents of the District. Iowa Code §282.1(1997). They are nonminorities. Therefore, the District correctly determined that even though these children have never attended school in the District, their transfers out of the District could negatively impact the District's desegregation plan.

Ms. Purscell and Ms. Wallace question how the residence of their children is determined. Iowa Code §282.1(1997) defines what a resident child is for purposes of school attendance and tuition. That section states: "a 'resident' means a child who is physically present in a district, whose residence has not been established in another district by operation of law, and who meets any of the following conditions: 1. Is in the district for the purpose of making a home and not solely for school purposes. …" In this particular case, the child's residence is with his custodial parent, or with his legal

guardian/grandmother. Therefore, Benjamin is a resident of the district where his father's home is located, since his father has custody. Tanner is a resident of the district where his grandmother/legal guardian's home is located.

Kristen Litzenberg was denied open enrollment, even though her older sister was granted open enrollment from the same school, Wallace Elementary. Wallace is a building closed to open enrollment for the 1998-99 school year. The difference between the children is the fact that Kristen's sister previously attended school in the S.E. Polk District. The family moved into the Des Moines District in the fall of 1997. Under those circumstances, a separate section of the Iowa Code applies to Kristen's sister. Whether or not a district has a desegregation plan does not matter. If a child's family moves, and the child is not currently open enrolled, the parents have the option to have the child continue attending school in the original district of residence with no interruption in the child's educational program. Iowa Code §282.18(9)(1997). This is commonly called open enrollment under the continuation provision of the Iowa Code. Therefore, the District correctly distinguished between Kristen and her sister.

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 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. The parents believe that their families' and children's best interest should override the District's desegregation plan. There is some support for this in 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. Last year, the State Board held that they do not. In re Charles Ashley, et al., 14 D.o.E. App. Dec. 123(1997); In re Jesse Bales, et al., 14 D.o.E. App. Dec. 143(1997).

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.

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Des Moines Independent Community School District made on January 20, 1998, which denied the Appellants' request for open enrollment for their children for the 1998-99 school year, on the grounds the transfers would adversely impact the District's desegregation plan, is hereby recommended for affirmance. 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