IOWA STATE BOARD
OF EDUCATION
(Cite as 15 D.o.E. App. Dec. 317)

In re Crystal & Jeffery Shofe	**:**	
Eugene & Gayle Shofe, Appellants,	**:**	
v.	**:**	DECISION
Burlington Community School District, Appellee.	**:**	[Admin Doc. #3963]

This case was heard telephonically on April 7, 1998 before a hearing panel comprising Ms. Sandy Hulse, Bureau of Administration/School Improvement Services; Ms. Jane Heinsen, Bureau of Practitioner Preparation & Licensure; and Amy Christensen, J.D., designated administrative law judge, presiding. The Appellants, Mr. and Mrs. Shofe, were present and were unrepresented by counsel. The Appellee, Burlington Community School District [hereinafter, "the District"], was present in the persons of Dr. Stephen Swanson, Superintendent; Mr. Larry MacBeth, Director of Instruction & Educational Programs; Mr. Dick Springsteen, Board Secretary; Ms. Connie O'Neill, secretary to Superintendent Swanson; and Mr. Bob Tyson, Principal at James Madison Middle School. The District was represented by Ms. Ann Tompkins.

An evidentiary hearing was held pursuant to department rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for the appeal 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 this appeal.

Mr. and Mrs. Shofe seek reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on January 26, 1998, which denied their applications for open enrollment out of the District, beginning with the 1998-99 school year. The basis for the denial was that the students' exit would adversely affect the District's desegregation plan.

I.
FINDINGS OF FACT

The Shofes live in the Burlington District. They timely applied for open enrollment for their children, Crystal and Jeffery, into the West Burlington Community School District for the 1998-99 year. In the fall of 1998, Crystal will be in the ninth

grade. Jeffery will be in the eighth grade. The Shofes' older daughter, Stephanie, has already open enrolled to the West Burlington District. She began attending school in West Burlington in the 1996-97 school year. The Shofes would like their children to attend school in the same District, so they applied for open enrollment for Crystal and Jeffery.

Jeffery Shofe has been diagnosed with Attention Deficit Hyperactivity Disorder. He began taking Ritalin approximately one week before the hearing in this case. The Shofes are very upset by the treatment they testified Jeffery receives from staff at his middle school. They testified he had been subjected to exceptionally rough treatment by staff, and one teacher, Mr. Worley, in particular. They testified Mr. Worley verbally abuses Jeffery to the point where he cries at home and is afraid of him. They testified that when Jeffery has a joint project with other students, he gets a failing grade when the other student gets a "C". They testified that because his name is Jeffery Shofe, he gets failing grades. They testified that early this year the principal, Mr. Tyson, had his house egged. They testified Jeffery was blamed for this, although it wasn't Jeffery, because they never let him out after dark. They testified Jeffery is given detention, but there is no set plan for detention, slips are just given to him. They testified teachers grab Jeffery and swear at him. The Shofes testified they have gone to Jeffery's teachers, principals, and the superintendent, and have not been able to resolve the situation.[1]

At the hearing, the Shofes were offered the option of having Jeffery transfer to another middle school in the District. They refused, saying James Madison is the best middle school in the District, and they would not want him to go to any of the other middle schools. They testified that if Jeffery is not allowed to open enroll, he will drop out of school.

James Madison Middle School has an at risk program. Each Tuesday and Thursday after school, a seventh grade team of teachers is available to help students with their work. Mr. and Mrs. Shofe testified that Jeffery does not take advantage of this because the Shofes thought Mr. Worley was in charge of the program. The District made it clear at the hearing that Mr. Worley is not in charge of the program, and there is a team of teachers available to help Jeffery if he chooses to participate. There is also another program available to Jeffery at another middle school on Thursday evenings. Principal Bob Tyson testified he spoke with Jeffery and his mother about the programs, and Jeffery's teachers also spoke with him about the program at James Madison. He also testified it is up to the parents to get their children to the programs if they want their students to participate. He also testified that teachers are available for a student to get extra help at any other time, and the student just has to ask.

[1] If the Shofes have concerns regarding the effect of Jeffery's ADHD on his school performance, they may request that the District evaluate him for a potential accommodation under section 504 of the Rehabilitation Act of 1973.

The Shofes believe Jeffery and Crystal would do better in a smaller district, so they would like them to attend school in West Burlington. They believe Jeffery would be able to get better grades in smaller classes. Although Crystal is not having problems in the District, the Shofes want her to open enroll so she can attend school with her brother and sister. The Shofe children are non-minority students.

On January 26, 1998, the Board denied the Shofe's applications for open enrollment. Jeffery and Crystal were denied open enrollment because the District deemed their transfer out of the District would adversely affect the District's desegregation plan under the minority/non-minority composite ratio portion of the District's open enrollment/desegregation plan.

Mr. and Mrs. Shofe argued that Jeffery's rights were being violated, and the District should not base its decision on whether enough minority students had applied for open enrollment. They also testified that the District had allowed Stephanie to exit the District, and did not follow its own sibling preference policy when it did not grant their current applications. They thought there was no hurry to apply, because once Stephanie had left the District, they thought Crystal and Jeffery could transfer out. They argue that the District is infringing on their rights under the open enrollment law to decide where their children will attend school. The Shofes testified that two children who were granted open enrollment were turned down by the West Burlington District for insufficient classroom space, and want to know why they haven't been notified that there are now additional spaces available. Finally, the Shofes argue the District's motive for denial of their applications was financial rather than their children's best interest.

The District has formally adopted open enrollment policies and procedures [hereinafter referred to as the policies] and a desegregation plan. They were based on the plans in place in the Des Moines and Waterloo Districts. They were last revised and adopted on December 9, 1996. The District followed regular procedures for adoption, and parents had the opportunity to comment at two public meetings. The policies and plan prohibit granting open enrollment when the transfer would adversely impact the District's desegregation plan. The policies and plan contain objective criteria which the District uses to determine whether a request for transfer would adversely affect the desegregation plan. They also contain objective criteria the District uses to prioritize those requests for transfer deemed not to have an adverse impact on the desegregation plan. Open Enrollment Procedures No. 105R states at page 13, "Open Enrollment – Standard Program transfers at any level (elementary, middle, or high school) may not cause an alteration to the District-wide Composite Ratio of minority to nonminority students. Applications for all students requesting a transfer out of the District will be denied if the release of the student (minority or non-minority) will adversely affect the District's 'Composite Ratio'". The procedures then state the District will use a random selection process to determine which students will be approved if more non-minority

students apply for open enrollment than can be allowed according to the composite ratio evaluation. The procedures describe the random selection process and its relationship to the sibling preference policy in detail.

Each year, the District receives a number of timely-filed applications for open enrollment for the following school year. The District determines eligibility or ineligibility of each applicant for open enrollment pursuant to its open enrollment and desegregation policies. Each child's racial status is considered, and the number of minority students applying for open enrollment is compared with the number of non-minority students applying for open enrollment. The ratio of minorities to non-minorities in each building in the District and for the District as a whole is determined. Whether the child has siblings previously approved for open enrollment out of the District is also determined.

For the 1997-98 school year, minority student enrollment in the Burlington District is 13%. Minority population in the community as a whole is approximately 8%. In the portion of the District's desegregation plan/open enrollment policies at issue in this case, the District developed a composite ratio of minority to non-minority students for the district as a whole in the fall of 1997. The number of minority and non-minority students in each building and in the District as a whole is updated each quarter during the year. The District's composite ratio is based on the district's official enrollment count taken in September. The district determined that since 13% of students in the District were minorities, and 87% of the students in the District were non-minorities, the composite ratio was 1:8. The composite ratio is used to preserve the District's minority/non-minority student ratio. This means that for every minority student who open enrolls out of the District, 8 non-minority students will be granted open enrollment.

One application for open enrollment out of the District was submitted by a minority student for the 1998-99 school year. Using the composite ratio of 1:8, the District determined that 8 non-minority students would be eligible for open enrollment for the 1998-99 school year.

There were 38 applications for open enrollment out of the District for the 1998-99 school year. One of these was a minority application. 37 were non-minority applications. Therefore, there were 37 non-minority applicants to fill 8 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, if they apply according to the restrictions in the policy. The student must apply for open enrollment the first year their sibling has open enrolled out of the District. There were 2 applicants with siblings who had previously been allowed to open enroll out of the District who met the requirements. Even though Stephanie had already open enrolled out of the District, Crystal and Jeffery did not meet the requirements of the sibling preference policy,

because their sister first open enrolled for the 1996-97 school year. In order to meet the requirements of the sibling preference policy, Crystal and Jeffery would have had to apply for open enrollment during the fall of 1996. Therefore, they were placed into the regular pool of applicants. There were 6 open enrollment slots, and 35 applicants.

In January, the District used a computer program to randomly select six students to fill the six positions, and these six children were allowed to open enroll. Jeffery and Crystal were not among the children approved for open enrollment. The remaining students were placed on a waiting list. Crystal and Jeffery are on the waiting list. If other minority students leave the District through open enrollment, or if approved students decide not to open enroll, a second random selection will be done later. As a result, if a second selection process is held, additional non-minority students will be allowed to open enroll in numbers according to the composite ratio.

Based on the composite ratio part of the open enrollment policies and 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 has followed this same procedure in prior years to determine whether there would be an adverse impact on the desegregation plan from open enrollment. For several years, enough minority students have applied for open enrollment so that all non-minority students who applied were allowed to leave. This is the first year for several years that only one minority student applied, which meant that not all non-minority students were approved.

The composite ratio portion of the District's open enrollment policies and desegregation plan is identical to the composite ratio portion of the Des Moines District's and Waterloo District's policies and plan. Application of the composite ratio portion to determine whether there is adverse impact on the District's desegregation plan by open enrollment of the students is also identical. The Des Moines 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, *Des Moines Independent School District v. Iowa Dept. of Education,* AA2432, filed June 1, 1995. Waterloo's was upheld by Black Hawk County District Judge Briner in his Decision on Appeal in *Waterloo v. Iowa Dept. of Education,* Case Nos. LACV075042 and LACV077403, August 8, 1996.

II.
CONCLUSIONS OF LAW

This case presents the 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."

The open enrollment law gives parents a great deal of choice in the schools their children may attend. Originally enacted in 1989, the 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.

In this case, the Shofes believe their children, particularly Jeffery, will be able to do better if he attends school in a smaller district with smaller class sizes. They would like all their children to attend school in the same district. The Shofes want what they believe is best for their children, and are seeking to obtain it by filing for open enrollment.

If the Burlington District did not have a desegregation plan, the Shofes could open enroll their children as requested, so long as the application was 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 Burlington District developed its open enrollment policies/desegregation plan 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 state guidelines are contained in *The Race Equity Review Process*, adopted April 12, 1990. The District has implemented a voluntary Desegregation Plan since 1971. Desegregation Plan, No. 105.1. In 1977, the Iowa Department of Education first cited the District for racial isolation in one of its attendance centers. Id. The District has revised its Desegregation Plan since 1971, last doing so in 1996. Id.

The District developed its open enrollment policies/desegregation plan in conformance with Iowa Code 282.18(12)(1997). As discussed above in the Findings of Fact, the policies and plan contain 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. 105.1, Desegregation Plan; Board Policy 105 and Board Procedures 105R, Open Enrollment. The policies and plan contain 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. The open enrollment procedures contain the objective procedure (i.e., the sibling preference policy and random selection process) by which student transfers deemed not to have an adverse impact will be prioritized.

By implication, the Shofes raised the issue of reverse discrimination. Judge Bergeson and Judge Briner addressed this issue in their decisions, and upheld the Des Moines and Waterloo Districts' policies. The composite ratio portion of the policies upheld by those judges is identical to that of the Burlington District. 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, supra. 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'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 upheld the Des Moines District's

composite ratio portion of the policy as substantially related to the governmental interest in achieving integrated schools. Id. Judge Briner used similar reasoning to uphold the Waterloo desegregation plan. *Waterloo v. Iowa Dept. of Education*, supra.

Similarly, the Burlington District has been struggling with racial isolation in at least some buildings, and has been working to desegregate its schools for many years. The minority student population in the District is higher than that of the county as a whole. The District also has a compelling governmental interest in achieving a racially integrated, diverse school system. The composite ratio portion of the Des Moines District which Judge Bergeson upheld as substantially related to the important governmental interest in desegregation is the same as that of Burlington's, its application is the same, and the allegation of reverse discrimination by the Shofes therefore fails.

Iowa Code section 282.18(3) and (12)(1997) do not require particular methods for a desegregation plan or open enrollment policy, other than they do require that "minority and nonminority pupil ratios shall be maintained according to the desegregation plan or order." Iowa Code section 282.18(3)(1997). Other than the requirement to maintain ratios, they merely require "objective criteria" to determine when an open enrollment request would adversely affect the district's desegregation plan, and for prioritizing requests that do not adversely impact the plan. The Board of the individual district has the discretion to choose whatever specific objective criteria it believes will work best in the district. *Waterloo v. Iowa Dept. of Education*, supra at p. 23. If the Burlington District chooses to limit its sibling preference policy to the first year the sibling leaves the District, it has the authority to do so. The District correctly followed its own policy when it determined that Crystal and Jeffery did not meet the restrictions for the sibling preference policy.

The District followed its open enrollment policies and the desegregation plan, and determined that Crystal and Jeffery's transfer out of the District would have an adverse impact on the desegregation plan. That determination is reasonable.

The Shofe's argument that the District's true motivation in denying their applications is financial is not persuasive. The District has had some form of desegregation plan in place since 1971, long before the open enrollment statute was enacted. State law clearly provides that districts with desegregation plans may deny open enrollment if there is an adverse impact on the plan. While there is obviously a financial benefit to the District if Crystal and Jeffery stay, the evidence at the hearing showed that the District followed the procedures set out in its open enrollment and desegregation policies and plan, and those procedures, policies, and plan conform to federal and state law. Therefore, the financial benefit to the District does not mean that the Board's decision to act according to its open enrollment policies and desegregation plan should be overturned.

Thus we have a conflict between the right of parents to choose their children's school, and the constitutional requirement of integration and the obligation of the District to implement it. The Shofes argue that the District should not be allowed to base its decision on whether enough minority students applied for open enrollment, and the District was not acting in their children's best interest. They suggest their perception of their children's best interest should override the District's composite ratio in the open enrollment/desegregation plan. Iowa Code section 282.18(18)(1997) 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 legislature's intent that we 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, non-minority 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. Judge Briner held they did not. In his decision, Judge Briner stated that "to the extent that the two goals, desegregation and open enrollment, may be in conflict, the statutory scheme gives primacy to the goal of desegregation." *Waterloo, supra at 19.* Furthermore, the State Board has held in several decisions that Iowa Code 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 re Zachary Sinram, Stephanie Dusenberry, and Dale Schultz,* 14 D.o.E. App. Dec. 216 (1997); *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). The Burlington District had the authority to deny open enrollment to Crystal and Jeffery, because their transfer out of the District would negatively impact the District's desegregation plan.

The State Board previously reversed the Burlington Board's denial of open enrollment on the basis that exit of the students would adversely affect the District's desegregation plan. *In re Seth Humpton, et al.,* 11 D.o.E. App. Dec. 282 (1994). However, we decline to follow *Humpton,* because since it was issued, two District Court cases dealing with the identical issue reversed the State Board. *Des Moines v. Iowa Dept. of Education, supra; Waterloo v. Iowa Dept. of Education, supra.*

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Burlington Community School District made on January 26, 1998, which denied the Shofes' requests for open enrollment for their children, Crystal and Jeffery, on the ground 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