IOWA STATE BOARD
OF EDUCATION
(Cite as 15 D.o.E. App. Dec. 261)

In re Rachel Remetch,

	:	
Tammy Remetch,		
Appellant,	:	
v.	:	DECISION
Waterloo Community School District,	:	
Appellee.	:	
		[Admin. Doc. #3965]

This case was heard telephonically on April 14, 1998 before a hearing panel comprising Dr. Maryellen Knowles, Bureau of Instructional Services; Ms. Jayne Sullivan, Bureau of Technical & Vocational Education; and Amy Christensen, designated administrative law judge, presiding. The Appellant, Ms. Tammy Remetch, was present and was unrepresented by counsel. The Appellee, Waterloo Community School District [hereinafter, "the District"], was present in the persons of Ms. Sharon Droste, Director of Staff Services, Mr. Bernard Cooper, Director of Student Services, and Ms. Sharon Miller, Board Secretary. The District was represented by Mr. Steve Weidner, attorney.

An evidentiary hearing was held pursuant to departmental rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for this appeal are found at Iowa Code sections 282.18 and 290.1(1997).

The Appellant seeks reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on January 26, 1998, which denied her request for open enrollment on the basis that the transfer would adversely affect the District's desegregation plan.

The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and the subject matter of the appeal before them.

I.
FINDINGS OF FACT

In re Rachel Remetch

Rachel is the daughter of Ms. Tammy Remetch, and she will enter eighth grade in the fall of 1998. The family lives in the Waterloo District. Rachel is currently being home schooled by her mother, and has never attended school in the Waterloo District.

Next year, if she were to attend school in the Waterloo District, Rachel would attend eighth grade at Central Middle School. Ms. Remetch would like to open enroll Rachel to the Hudson District.

Rachel's oldest sister, Hannah, is open enrolled to the Hudson District. Hannah began open enrollment in the 1996-97 school year. Her attendance center if she had attended school in the Waterloo District would have been West High School. Rachel's other sister, Elizabeth, will begin open enrollment to the Hudson District for the 1998-99 school year. Her attendance center if she attended school in the Waterloo District during 1998-99 would also be West High. All of the girls are non-minority students.

Ms. Remetch would like her daughters to attend school in the same district. Since Rachel is older, she believes it would be better for her to attend school with other students rather than continuing her home schooling. However, since she has home schooled Rachel to this point, she feels the Waterloo District is too big for Rachel. Ms. Remetch would like Rachel to have one year of attendance in the Hudson District before she begins high school. She would like her daughters to be able to participate in school activities together, and obtain the kind of education she would like them to have in a smaller district.

The District denied Ms. Remetch's request for open enrollment for Rachel at the Board meeting on January 26, 1998. The District denied her request for open enrollment because Rachel is a non-minority student, she lives in the Central Middle School attendance area, and non-minority students are not allowed to exit Central under the building-specific portion of the District's desegregation policy. Ms. Remetch then filed this appeal.

Ms. Remetch questions why Rachel's exit from the District would adversely affect the District's desegregation plan, since Rachel has never attended school in the District. She also does not see the point of having an open enrollment law if the District can deny her the right to use it. She states that her daughter is being subjected to reverse discrimination, because she may not leave the District solely because she is a non-minority student. She wants all of her children to attend school in the Hudson District, and believes it is her right as a parent to choose the District she believes is best for her daughters.

The District

The Waterloo District has an open enrollment/desegregation policy and plan. The purpose of the plan is to maintain diversity in the District's student body. The open enrollment program (Policy JECCE) provides that "Maintaining the District's current racial characteristics is critical to its desegregation efforts, ability to comply with state guidelines on minority/nonminority ratios, [and] long-term racial and economic stability.

Therefore, minority/nonminority student ratios at both the District level and building levels will be primary determinants when making decisions on transfer requests. (See Administrative Regulation JECCE-R)".

Administrative Regulation JECCE-R provides that the Superintendent is to review and process open enrollment requests and make recommendations to the Board for approval or denial of the applications based on "the impact approval of the application would have on the District's desegregation efforts." The District will follow guidelines set out in the regulation. Among the guidelines is included the following: "Open enrollment approvals may not cause the minority percentage of a school to exceed the District's minority percentage by more than twenty (20) percentage points." The following is another guideline: "To maintain racial diversity in district schools, minority students wishing to transfer from the District will be denied approval if they attend a school with a minority enrollment percentage which is at least five (5) percent less than the District average. Nonminority students wishing to transfer from the District will be denied approval if they attend a school with a minority enrollment that is five (5) percent greater than the District average." A third guideline is: "Request for open enrollment transfer out of the District will not be granted if it is found the release of the pupil(s) requesting to do so will adversely affect the district's existing minority/nonminority ratio."

The open enrollment/desegregation policy contains a sibling preference, so that applications of siblings of students previously approved for open enrollment will be given first priority. However, the sibling preference policy does not apply to the building-specific portion of the desegregation plan. Therefore, non-minority students who will attend a building with a minority percentage five percent greater than the District average will not be allowed to transfer out of the building (and thus out of the District) even if they have siblings who were previously allowed to open enroll.

The District determined that Rachel’s transfer out of the District would adversely affect the District's desegregation plan. It therefore determined she was ineligible for open enrollment for the 1998-99 school year based on the open enrollment/desegregation policy and plan. The action to deny the application for open enrollment was taken on January 26, 1998.

For the 1997-98 school year, minority enrollment in the Waterloo District as a whole is 30.3%. Minority enrollment at Central Middle School is 39.1%. Minority enrollment at West High School is 21.5%. Minority enrollment at West High School has ranged from 18-21% during the last few years. These percentages are based on the District's official enrollment count made in September 1997. Decisions regarding open enrollment requests for the 1998-99 school year were based on these numbers.

Rachel Remetch was denied open enrollment because her assigned school for the 1998-99 school year is Central Middle School, and she is a non-minority student. The District determined that since Central Middle School has a minority enrollment of 39.1%, and the District average minority enrollment is 30.3%, that no non-minority students would be able to transfer from the building and thus out of the District. This is pursuant to the part of the District's desegregation plan which provides that non-minority students who wish to transfer from the District will be denied approval if they attend a building with a minority enrollment that is five percent greater than the District average. Elizabeth was allowed to open enroll, because her attendance center is West High, with a minority enrollment of 21.5%, which is significantly less than the District average. Therefore, non-minority students are allowed to exit West High, and thus the District, so long as the composite ratio part of the District's plan is not violated.

In the District's composite ratio portion of its desegregation plan, the District develops a composite ratio of minority to non-minority students for the District as a whole for each school year. The ratio is based on the District's official enrollment count taken in September. 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, a certain number of non-minority students are allowed to open enroll out of the District. The composite ratio is determined each year based on the number of minority and nonminority students enrolled in the District. Historically, the District's composite ratio has been 1:3, which meant that for every minority student who open enrolled out of the District, three non-minority students were allowed to leave. This composite ratio part of the District's desegregation plan was not used with regard to Rachel, because she was denied open enrollment pursuant to the building-specific part of the desegregation plan. However, it would have been applied to Elizabeth's application. In addition, Elizabeth's application would have been given priority under the sibling preference policy, which does apply to the composite ration portion of the desegregation plan.

The District has consistently applied its open enrollment/desegregation policy. The District's practice of denying open enrollment applications under both the building specific and composite ratio portions of its open enrollment/desegregation policy was upheld by Black Hawk District Court Judge Briner in the Decision on Appeal in *Waterloo v. Iowa Dept. of Education*, Case Nos. LACV075042 and LACV077403, dated August 8, 1996. There have been no changes to the open enrollment/desegregation policy and plan since the decision was issued by Judge Briner. The District's open enrollment/desegregation plan and its application have also been upheld by the Iowa Department of Education. *In re Zachary Sinram, Stephanie Dusenberry, and Dale Schultz*, 14 D.o.E. App. Dec. 216 (1997). There have been no changes to the plan since the *Sinram* decision was issued.

II.
CONCLUSIONS OF LAW

There are two very important interests which 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."

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.

In this case, Ms. Remetch has important and valid reasons for requesting open enrollment for Rachel. She is genuinely interested in what is best for her children, and is seeking to obtain it by filing for open enrollment. There is value in having siblings attend school in the same district, a fact which is recognized by the sibling preference policy in the District's desegregation plan. Ms. Remetch has a legitimate concern that having Rachel go from home schooling directly into a large system could be difficult. She is probably correct that since Rachel is older, there would be a great benefit for her to attend school with her peers.

If the Waterloo District did not have a desegregation plan, there would be no question that Ms. Remetch could open enroll Rachel 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.
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> 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).

The Waterloo 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. 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. State Board guidelines first adopted in 1972, and still in effect as modified, state that any building with a minority population twenty percentage points above the district-wide average minority population is in violation of the guidelines. *The Race Equity Review Process*, adopted April 12, 1990.

The District has had a long history of attempting to eliminate racial segregation in its schools, beginning in about 1967. *Waterloo v. Iowa Dept. of Education*, Black Hawk County District Court Decision on Appeal, Judge Briner, Case. Nos. LACV075042 and LACV077403, August 8, 1996; Waterloo Desegregation Plan. The Board adopted a voluntary transfer plan in 1968. Id. The District continued to experience racial isolation in many of its schools, and adopted a desegregation plan in 1973. Id. Throughout the following years, the District has undertaken a great deal of effort to desegregate its schools and deal with declining enrollment in the District. Id. The Waterloo District has a much higher minority student population than surrounding districts. Id. For example, during 1993-94, Waterloo's minority student percentage was 26.2, Cedar Falls was 5.89%, and the remaining five districts were less than two percent minority. Id. Throughout the early 1990s, minority persons comprised approximately 12-13% of the population of Waterloo, but comprised a substantially higher percentage of the students in the Waterloo District (21.8 - 26.2%). Id.

The District adopted its current open enrollment/desegregation plan on October 25, 1993. Id. The District continues to have some schools which are not in compliance with the state guideline, and minority population in those buildings is greater than 20 percentage points above the District-wide average percentage. District Exhibit No. 2. The District also continues to have some schools with a very low minority population. 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). The criteria are contained in Board Policy JECCE and Administrative Regulation JECCE-R. The policy contains criteria for determining when a particular building is closed to open enrollment because exit of certain students from that building will have an adverse impact on the desegregation plan. It 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. These provisions

were upheld by Judge Briner in his Decision in *Waterloo v. Iowa Dept. of Education*, supra, and by the Iowa State Board of Education in *In re Zachary Sinram, Stephanie Dusenberry, and Dale Schultz,* 14 D.o.E. App. Dec. 216 (1997).

Central Middle School has a minority student population which is 8.8 percentage points above the District's average minority population. The District therefore has closed the building to open enrollment for non-minority students. The determination by the District that Rachel's exit from the building would adversely impact the District's desegregation plan was reasonable and in accordance with the plan.

Ms. Remetch raised the issue of reverse discrimination, and argued that Rachel was being discriminated against because she is white, since she would have been allowed to transfer out of her assigned building if she were a minority student. 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. *Waterloo v. Iowa Dept. of Education*, supra at 30. The question to be asked is whether the classification "serves important governmental objectives" and is "substantially related to" achievement of those objectives. Id. Actions of government agencies which use race conscious, not racially preferential, remedies to achieve desegregation are subject to this kind of scrutiny. Id. As Judge Briner found, the District's "desegregation plan is such a remedial measure taken to bring the District into compliance with the constitutional mandates and policy preferences favoring desegregation". Id. Judge Briner found that if the District had approved all open enrollment applications, it would have adversely affected the District's desegregation plan. Id. He also found that the District's open enrollment/desegregation policy is substantially related to the important governmental objective of desegregation. Id. Similarly, the State Board of Education upheld the District's plan in *In re Zachary Sinram, Stephanie Dusenberry, and Dale Schultz,* 14 D.o.E. App. Dec. 216 (1997).

The circumstances in the Waterloo District have not changed since Judge Briner's decision. Therefore, the important governmental interest of the District remains, the remedies upheld by Judge Briner as substantially related to the important governmental interest are the same, and the allegation of reverse discrimination by Ms. Remetch therefore fails.

Ms. Remetch questioned how transfer of her daughter could impact the District's desegregation plan, since Rachel has never attended school in the District. 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." The position of a parent who home schools a child is the same as a parent who sends the child to private school. In this case, Ms. Remetch was not trying to circumvent the desegregation plan by home schooling Rachel. However, the good intentions of this particular parent do not mean that the State Board or the District should create a loophole which could gut the District's desegregation efforts. In addition, Rachel's attendance at Central Middle School next year would improve the racial balance at the school, because she is a non-minority, and Central has a substantially higher percentage of minority students than the District as a whole. In determining eligibility of a student to open enroll, the District looks at the attendance center where the student would attend the next year. Since the District does not allow non-minority students to leave Central because of the high minority student percentage, a non-minority student's absence from the school adversely affects the ratio of non-minority to minority students. Regardless of where she came from, Rachel's absence at Central next year will adversely impact the school's racial balance, and thus the District's desegregation plan. Therefore, the District correctly determined that even though she has been home schooled, her transfer out of the District next year would negatively impact the District's desegregation plan.

The District followed its open enrollment/desegregation policy when it denied Rachel's application, and determined that her transfer would have an adverse impact on the desegregation policy. We agree with that determination.

As Ms. Remetch pointed out, there is a conflict in the law 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. 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 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, 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.

In discussing paragraphs 282.18(1) and 282.18(4)[now (3)](1995) of the Iowa Code, Judge Briner stated in his decision that the legislature recognized that both desegregation and parental choice through open enrollment were legitimate goals. However, he said, "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.

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. Last year, we determined that they do not. *Sinram, supra at 229*. 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 this case. The Waterloo District had the authority to deny open enrollment to Rachel, because her transfer out of her assigned building would negatively impact the District's desegregation plan.

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Waterloo Independent Community School District made on January 26, 1998, which denied Ms. Remetch's request for open enrollment for Rachel for the 1998-99 school year, because her transfer 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