IOWA STATE BOARD
OF EDUCATION
(Cite as 15 D.o.E. App. Dec. 210)

In re Khloe P. Hermel	:	
Ryan & Christine Rand, Appellants,	:	DECISION
v.	:	
Cedar Rapids Community School District, Appellee.	:	[Admin. Doc. #3945]

This case was heard telephonically on February 26, 1998 before a hearing panel comprising Mr. Milt Wilson, Bureau of Administration, Instruction & School Improvement; Ms. Mary Wiberg, Bureau of Technical & Vocational Education; and Amy Christensen, designated administrative law judge, presiding. The Appellants, Mrs. Christine and Mr. Ryan Rand, were present telephonically and were represented by attorney Ms. Linda Levey. The Appellee, Cedar Rapids Community School District [hereinafter, "the District"], was present telephonically in the persons of Mr. Nelson Evans, Director of Elementary & Secondary Education, and Mrs. Ellyn Wrzeski, Associate Superintendent. The District was unrepresented by counsel.

An evidentiary hearing was held pursuant to departmental rules found at 281 Iowa Administrative Code Ch. 6. Authority and jurisdiction for this 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. Rand seek reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on January 12, 1998, which denied their application for open enrollment for their daughter, Khloe. The denial was based on a finding that the transfer would adversely impact the District's desegregation/integration plan.

I.
FINDINGS OF FACT

Mr. and Mrs. Rand and their children, Khloe and Kyle, live in the country on the east edge of the Cedar Rapids School District. Khloe is five, and Kyle is three. Khloe is scheduled to begin kindergarten next fall. She would attend kindergarten at the Monroe Early Childhood Center, and at Erskin Elementary for the rest of elementary school.

Mr. and Mrs. Rand applied for open enrollment for Khloe to the Mt. Vernon Community School District in August of 1997. Both of the Rands attended smaller schools, and they would like Khloe to attend a smaller school for a number of reasons. They believe there are greater opportunities for children to participate in extracurricular activities in smaller schools. They would also like Khloe to attend half-day kindergarten, which is offered at Mt. Vernon. Because they live on the east edge of the Cedar Rapids District, the driving time is shorter to the Mt. Vernon school. Also, the Rands attend church in Mt. Vernon, and shop there when they can.

When they applied for open enrollment, the Rands were not informed of the District's desegregation plan or the restrictions it placed on some open enrollment requests out of the District. They thought the grant of the application would be fairly automatic, and did not attend the January 12, 1998 Board meeting. Therefore, they were very surprised when the District denied Khloe's application at the Board meeting. On January 13, Mr. Evans sent a letter to Mrs. Rand informing her of the Board's decision. The letter was less than clear regarding the reason for the Board's denial, and included only District Regulation 602.6 and Procedure 602.6a as enclosures.

Once they received the denial, the Rands called the District and requested a copy of the District's desegregation plan and data regarding minority enrollment in the Cedar Rapids District. The Rands requested the desegregation plan and certain information on February 12. As of the date of the hearing, the Rands had not received this information from the District. At some point, the Rands were told that Erskine Elementary, where Khloe would attend first grade, was not subject to the District's desegregation plan, and Khloe could open enroll from Erskine next year.

Since they could not understand the reason for the Board's denial, the Rands called attorney Linda Levey. Beginning on February 17, Ms. Levey made multiple requests for information and the District's Desegregation Plan. She first faxed a request for the desegregation plan, and was told by someone named Myrna that she would overnight mail the information. Ms. Levey did not receive anything from Myrna. Ms. Levey also spoke with Ms. Jan Kies on the same date. By Friday, February 20, Ms. Levy had not received anything from the District, so she again spoke with Myrna and Ms. Keis. Myrna again told her she would overnight the information to her at her home the next day. Mr. Evans called Ms. Levey that afternoon and discussed minority population in the District and the desegregation plan, which Ms. Levey had not yet received from the

District. Mr. Evans told her he would overnight the information. Later that day, she received a fax from Myrna that included only Procedure 602.8a. She did not receive an overnight package on Saturday or Monday from the District. She left messages for Myrna and Ms. Kies of this. Ms. Kies called and left a message giving her corrected open enrollment numbers, but could not give her other requested information because of computer problems. She also told Ms. Levey that Procedure 602.8a was the District's desegregation plan. On Tuesday, February 24, Ms. Levey also spoke with Ms. Kies, who gave her some information regarding minority/non-minority open enrollment and limited information regarding the desegregation plan. She also faxed her District Regulation 602.8.

Mr. Nelson Evans is the Director of Elementary and Secondary Education for the Cedar Rapids District. When the undersigned administrative law judge asked Mr. Evans at the hearing whether District Regulations 602.6 and 602.8 and Procedures 602.6a and 602.8a were the District's Desegregation Plan, Mr. Evans at first answered "no". When asked what the plan was, he at first testified it included supporting historical information. However, he then testified the Desegregation Plan itself is only Regulations 602.6 and 602.8, and Procedures 602.6a and 602.8a. Although the testimony was confusing, it appears that the District has a formally adopted desegregation plan with enrollment guidelines. Mr. Evans testified the plan is based on the Department of Education guidelines to prevent minority isolation.

The District's open enrollment policy states that requests to transfer out of the District may be denied if the desegregation/integration plan would be adversely affected. District Regulation 602.6. The District's open enrollment policy contains a paragraph that states when open enrollment would adversely affect the District's desegregation-integration plan. Procedure 602.6a. Procedure 602.6a states: "The Desegregation-Integration Plan would be adversely affected if: 1) the transfer requests to other districts would raise or sustain the minority enrollment of the District attendance center within ten per cent of the Department of Education guidelines....". Once this percentage of minority student population is reached in any building, the District's Desegregation Plan applies to that school. District Regulation 602.8 and Procedure 602.8a contain additional guidelines regarding open enrollment and the desegregation plan.

Department of Education guidelines contained in *The Race Equity Review Process*, approved April 12, 1990, state that when a building's minority enrollment is more than 20 percentage points above the District's minority enrollment percentage as a whole, the building is in violation of the guidelines. Mr. Evans testified the District uses the figure of within ten percent of the Department of Education guidelines because of the small numbers of minority students in the District. As he explained, the exit or addition of a very small number of students could change the minority percentage a great deal, and put the building out of compliance. In order to avoid going over the State guidelines, the District has built in the ten per cent cushion.

The District's minority student percentage for the 1997-98 school year is 12.44%, which the District rounds down to 12%. The minority student percentage at Monroe Early Childhood Center is 25.86% (which the District rounds to 26%) for the 1997-98 school year. The minority student percentage at Erskine Elementary School is 15% for the 1997-98 school year. The District bases these percentages on the official student count made each school year in September. The percentages may change each year.

Mr. Evans testified the District determined Khloe's open enrollment would adversely affect the District's desegregation plan in the following way. Since Monroe's minority population is 26%, Mr. Evans testified the District added 10% to this figure, obtaining 36%. The District then took its District-wide minority percentage of 12%, and added 20% to that figure, obtaining 32%. The District then compared Monroe's 36% with the District's 32%, and determined that Monroe was subject to the desegregation plan. Because of its high minority student population, the District will not allow non-minority students to leave Monroe through open enrollment for the 1998-99 school year. Therefore, the staff recommended, and the Board denied Khloe's open enrollment application.

Since Erskine Elementary's minority population is only 15%, this is not within ten percent of the Department of Education guidelines, and Erskine is not closed to open enrollment. If Khloe were applying for open enrollment from Erskine, the application would be granted, assuming the application was filed timely.

The Cedar Rapids District does not have a second tier for evaluation of whether exit of non-minority students through open enrollment would adversely impact the District's desegregation plan. Some districts evaluate not only impact on a particular building, as Cedar Rapids does, but also impact based on district-wide minority/non-minority ratios. Therefore, the Cedar Rapid District does not consider the total District-wide numbers of minority and non-minority students exiting the District through open enrollment when deciding whether the open enrollment of a particular student adversely impacts the desegregation plan. The only information the District uses is that related to minority/non-minority population of a particular building.

The District publishes its desegregation plan, along with a list of schools it believes will be impacted in the newspaper and school newsletter in August of each year. Monroe was not listed in this publication, because its minority/non-minority numbers fluctuate, and the District did not know whether it would be impacted this year. The actual determination of which schools will be impacted is made after the official count of students made on the third Friday in September. The Rands did not know of the publication in either the newspaper or the newsletter.

II.
CONCLUSIONS OF LAW

This case presents a collision of two very important interests: the right of parents to choose the school they feel would be best for their child 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 Appellants point out that the District has no criteria for prioritizing requests that do not have an adverse impact on the order or plan. Since the District only evaluates adverse impact on a building level, and not a district-wide level, this is not applicable. Criteria for prioritizing requests is used by districts when they evaluate district-wide impact.

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 the application, unless the transfer of the student will negatively impact the district's desegregation plan. Id.

In this case, the parents have important and valid reasons for requesting open enrollment for Khloe. The Rands are genuinely interested in what is best for Khloe, and are seeking to obtain it by filing for open enrollment.

If the Cedar Rapids District did not have a desegregation plan, there would be no question that the Rands could open enroll Khloe as requested, so long as the application was filed in a timely manner. However, the District does have such a plan. It contains objective criteria [i.e., when a particular building's minority population comes within ten percent of the Department of Education guidelines] for determining when an open enrollment request would adversely affect the District's desegregation plan as required by Iowa Code section 282.18(12)(1997). Last year, the State Board upheld the ten percent figure in In re Christina E. Hamous, 14 D.o.E. App. Dec. 165 (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).

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

The Cedar Rapids District developed its open enrollment/desegregation policy to conform to these requirements, to conform to the requirements of Iowa Code section 282.18(12), 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 Cedar Rapids District policy contains objective criteria for determining when open enrollment transfers will adversely impact the District's desegregation plan, as required by 282.18(12)(1997). Board Regulations 602.6 and 602.6a, Open Enrollment, and Board Procedure 602.8a, Desegregation-Integration. For buildings with a minority student population within ten percent of the Department guidelines, (i.e. greater than 10 percentage points above the District-wide minority percentage), non-minority students may not transfer out of the building. One of these buildings is Monroe, which has a minority student population percentage of 26% for the 1997-98 school year, as compared to 12% for the District as a whole. The Rands argue that the use of the 10% figure is overly broad, and denies too many open enrollment requests. Considering the District's evidence that it has a relatively small number of minority students, that the exit of even a few students can therefore change the minority percentage a great deal, and that therefore the District needs a cushion of 10% to avoid violating the State Board guidelines, the District's use of the 10% figure is reasonable.

With respect to Khloe, the District followed its open enrollment/desegregation policy, and determined that her transfer would have an adverse impact on its desegregation plan. We agree with that determination.

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." Last year, the State Board held that Iowa Code section 282.18(18)(1997) could not be used to allow a student to exit a district when the district determined that the open enrollment request would adversely impact the district's desegregation plan. In re Christina Hamous, 14 D.o.E. App. Dec. 165 (1997). We affirm that decision today.

The Cedar Rapids District had the authority to deny open enrollment to Khloe, because her transfer out of the District would negatively impact the District's desegregation plan.

We note that Mr. Evan's written recommendation to the Board contains a deadline for submission of open enrollment applications that is based on the old deadline in the Iowa Code. Since the Iowa Code deadlines have changed, and the District's policy has been updated to reflect the new deadline, Mr. Evan's recommendations should contain the new date.

A large part of the problem in this case involves the lack of clarity regarding what the District's Desegregation Plan is by District staff. We strongly recommend that the District have a document containing the District's Desegregation Plan that is identified as the Desegregation Plan. In that way, District staff will have a clear understanding what the plan is, and when members of the public request the District's Desegregation Plan, District staff will know what to give them. It would be helpful to parents to include an example of how the plan works as to a particular building, and an explanation of the use of the ten percent figure. Inclusion of historical information would provide a basis for the Desegregation Plan, and would be helpful to those persons trying to understand it. The District did a disservice to the Rands and their attorney by not providing them with requested information in a clear and timely manner.

The parents argue that the publication by the District in August of impacted buildings did not include Monroe, and that in any event, the Rands did not see the publication in either the newspaper or the school newsletter. Considering that the District is not required to make this publication, and that it cannot make a complete evaluation until the official count date, we find the procedure followed by the District in publishing a list of schools it believes will be impacted is reasonable.

Finally, we note that parents are not required by law to send their children to kindergarten.

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Cedar Rapids Community School District made on January 12, 1998, which denied the Rands' request for open enrollment for their daughter Khloe for the 1998-99 school year, on the grounds the 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