IOWA STATE DEPARTMENT OF EDUCATION
(Cite as 15 D.o.E. App. Dec. 11)

In re Jonathan D. Kitzinger	**:**	
David & Jerilyn Kitzinger, Appellants,	**:**	
v.	**:**	DECISION
Titonka Consolidated School District, Appellee.	**:**	
		[Admin. Doc. #3907]

This case was heard telephonically on August 4, 1997, before a hearing panel comprising Dr. Maryellen Knowles, Bureau of Administration, Instruction, and School Improvement; Ms. Mary Wilberg, Bureau of Technical and Vocational Education; and Amy Christensen, J.D., designated administrative law judge, presiding. The Appellants, Mr. David and Mrs. Jerilyn Kitzinger, were present telephonically and were unrepresented by counsel. The Appellee, Titonka Community School District [hereinafter, "the District"], was present telephonically in the persons of Mr. Don West, superintendent; Ms. Mary Beth Wubben, board secretary; and board members Mr. Jeff Schutjer and Dr. Michael Heyer. The District was also unrepresented by counsel.

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

Mr. and Mrs. Kitzinger, the Appellants, seek reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on July 14, 1997, which denied their request for open enrollment for their son, Jonathan.

I.
FINDINGS OF FACT

The Kitzingers live in the town of Titonka, Iowa. Their son, Jonathan, has attended elementary and middle school in the Titonka Consolidated School District, and the family is happy with the education he has been receiving. Last year, Jonathan was a freshman at the Woden-Crystal Lake-Titonka High School. During his freshman year,

Jonathan was somewhat disappointed in the extracurricular activities. He also had scheduling conflicts, and problems with the academic program offered. The Kitzingers decided to open enroll Jonathan to another District. In the spring of 1997, they called board members to discuss the open enrollment application, and filed the application on June 23, 1997. The Kitzingers also talked with other families who had filed open enrollment applications late in previous years. Those families told the Kitzingers their applications had been granted, and they believed the Kitzingers would have no problem receiving approval for their application.

During the last several years, the Titonka Board has approved approximately 11 late-filed open enrollment requests out of the District. The latest approvals were in April and May of 1996. However, at the June 24, 1997, Board meeting, the Board denied open enrollment requests for two students other than Jonathan Kitzinger. Mr. Don West, superintendent of Titonka, testified that the Kitzinger application was placed on the Board agenda for the June 24th meeting. However, he testified that the Board needed more time to think about the application before deciding whether or not to grant it. Therefore, they tabled the issue until the July 14, 1997, Board meeting. At the Board meeting on July 14, 1997, the Board denied the Kitzingers' application for open enrollment.

Mr. Kitzinger testified that the Board decided to change its policy after they had filed Jonathan's application for open enrollment. Because the Board had approved 11 late-filed open enrollment applications in the past, he believes that the Board singled out their application for different treatment.

The Kitzingers did not file their application for open enrollment by the January 1st deadline because Jonathan had not made up his mind to open enroll by January 1st, and since the Board had always granted late-filed open enrollment applications, they did not feel the deadline was even an issue. The Kitzingers believed that the deadline for filing was October 30th. The first time the Kitzingers found out that the policy had changed was immediately after the June 24, 1997, Board meeting. In the June 26, 1997, Titonka newspaper, there was an article which stated that the Titonka Board of Education had decided to take a hard line stand on late-filed open enrollment applications. The article told of the denial of the open enrollment applications for two middle school students at the June 24th Board meeting, stated that the Kitzingers' application had been tabled until the following month, and quoted one board member, Nola Cooper, as saying, " It is now time to inform our public that we will adhere to those dates."

Superintendent West testified that in 1989 or 1990, the District entered into a whole-grade sharing agreement with Buffalo Center. This whole-grade sharing agreement did not work out, and Titonka later entered into a whole-grade sharing

agreement with Woden-Crystal Lake. Mr. Kitzinger was actively involved in working with the District to enable it to enter into this second whole-grade sharing agreement. At the time Titonka pulled out of the whole-grade sharing agreement with Buffalo Center, Superintendent West testified that the Board's position was that although students by law had 45 days to file for open enrollment, the Board would not hold anyone to this time deadline. The Board said it would approve any open enrollments, and let the people decide where they wanted to send their children to school. Superintendent West testified that there were many late open enrollment requests granted which were related to the changing of the whole-grade sharing agreement. He testified that the Board has also granted late-filed applications for other reasons, such as a change in a parent's marital status, or allowing students to continue in their old districts when parents moved into the Titonka District. Superintendent West testified that although the Board had granted a number of late-filed open enrollment applications, most of them were related to reasons such as the above.

Superintendent West also testified that Mr. Kitzinger was correct, that two late-filed open enrollment applications had been granted in 1996. Superintendent West testified that there has been a change in the Board membership since those decisions were made. Therefore, he testified, the feeling of the Board regarding late-filed open enrollment applications has changed. Superintendent West also testified the District has always published the open enrollment deadlines in school newsletters and in the newspaper.

On April 18, 1996, the Board granted a late-filed open enrollment application for Andrea Christenson. On May 13, 1996, the Board approved a late-filed open enrollment request for Jennifer Sleper. From May of 1996 through June of 1997, the District did not have any other late-filed open enrollment applications. Superintendent West testified he does not know why the Board approved the late-filed open enrollment applications for Andrea in April and Jennifer in May of 1996. To his knowledge, he testified, reasons for granting the late-filed open enrollment requests were not given. Superintendent West testified that both of these students were middle school students. Other than this, he does not know any difference between these two students and the circumstances surrounding the Kitzingers' application.

Superintendent West testified he could not give a reason why the Board would grant these two applications and deny the Kitzinger application, except that there was a change in the Board membership. In the fall of 1996, a new Board member came onto the Board. The Board has five members. The first time the Board denied a late-filed open enrollment application was the two Toenges applications, which were denied on June 24, 1997. The District had no late-filed applications for open enrollment out of the District submitted between January 1, 1997, and May 31, 1997.

Board member Jeff Schutjer testified that prior to the September 1996 election, the Board had had one member who always opposed late-filed open enrollment applications for middle school. Another Board member always opposed late-filed open enrollment applications regardless of grade level. With the September 1996 election, the Board added a new Board member who had no past record regarding open enrollment applications. On June 24, 1997, the new Board addressed the issue of late-filed applications for the first time. When he voted, the new Board member voted not to approve the Toenges open enrollment application. Board member Schutjer testified that the reason the Kitzinger application was tabled was because the Board had just voted for the first time to deny the late-filed application for the Toenges' children, and the Board members had to look into themselves to see if that applied to the Kitzinger case as well. The Toenges' case involved one middle-school student and one elementary-school student. Mr. Schutjer testified that in the past, the Board had approved high school open enrollment requests which were late-filed on a vote of 4 to 1. Therefore, along with the new Board member who voted to oppose the open enrollment applications, one Board member must have changed his vote from approval to denial in June and July of 1997. Board member Schutjer testified that he is only aware of one open enrollment application filed for a middle-school student. He believes the one Board member who voted against that application felt that the student was not changing schools to get a better education, but for some personal reason, and therefore, she voted against the open enrollment application. With regard to the late-filed open enrollment applications that were granted in 1996, the Board voted 3 to 1 to grant one of the applications, and voted 4 to 1 to grant the other application. Board member Schutjer testified that there were no unusual circumstances regarding the late-filed applications that were granted in 1996, other than the fact that both students were freshman students.

Superintendent West testified that the Board did not have a policy of granting late-filed open enrollment applications prior to June 24th. Rather, the Board had a feeling that it would go along with late-filed open enrollment applications. When the change of board member occurred in September 1996, then Superintendent West believes the feeling of the Board changed. The Board did not do anything to inform the public that its feeling had changed, and that late-filed open enrollment applications would not be granted.

The District published notice of the January 1st open enrollment deadline in the Titonka newspaper in September, and in the school newsletter which is sent to every patron in the District in the fall of 1996, just as it had every year prior to 1996. In the newsletter and newspaper, the District did not put any notice which stated that although in the past the Board had granted late-filed open enrollment applications, it would no longer do so.

The District has a Board policy, number 501.12, which states that open enrollment applications are to be filed by January 1st. The Board policy was adopted September 11, 1995, and was revised September 9, 1996. At the Board meeting on September 9th when the Board revised the policy, there was no discussion that the Board's feeling had changed regarding granting late-filed open enrollment applications. Prior to September 1996, the Board policy stated that applications must be filed by the October 30th deadline. There was no exception listed for late-filed applications related to the change in the whole-grade sharing agreement. The Board did not follow its written policy prior to June 1997.

The first time Superintendent West knew the Board was not going to grant late-filed open enrollment applications was at the Board meeting on June 24, 1997, when the Toenges applications were denied. The Board decided to change its practice on June 24, 1997.

Superintendent West testified most of the late-filed open enrollment applications that had been granted were filed around the time of the change in the whole-grade sharing agreement. However, the two late-filed open enrollment requests which were granted in 1996 were filed late in 1996, the school year following the change in the whole-grade sharing agreement. Neither of those parents were divorced, nor moved. Superintendent West agreed with Mr. Kitzinger at the hearing that there would be no way for the public to recognize that there had been a change in the feeling of the Board regarding late-filed open enrollment applications until the June 24, 1997, Board meeting. Superintendent West testified that both he and Mr. Kitzinger would not have known what the vote would be until the June 24, 1997, Board meeting.

At the conclusion of the hearing, the panel issued an oral decision to the parties. Subsequent to the hearing, the District sent a letter to the Department of Education requesting that a written decision be issued. This decision is being issued pursuant to that request.

II.
CONCLUSIONS OF LAW

Review of the Board's decision in this case by the Iowa Department of Education is de novo. In re Debra Miller, 13 D.o.E. App. Dec. 303(1996). The decision must be based on the laws of the United States and the State of Iowa, the regulations and policies of the Department of Education, and "shall be in the best interest of education". 281 Iowa Administrative Code 6.11(2). Essentially, the test is one of reasonableness. In re Michael J. Pringle, 14 D.o.E. App. Dec. 365 (1997); In re Jesse Bachman, 13 D.o.E. App. Dec. 363(1996).

The open enrollment law was written to allow parents to maximize educational opportunities for their children. Iowa Code Section 282.18(1)(1997). However, in order to take advantage of the opportunity, the law requires that parents follow certain minimal requirements, including filing the application for open enrollment by January 1st of the preceding school year. Iowa Code section 282.18(2)(1997).

The legislature recognized that certain events would prevent a parent from meeting the January 1st deadline. Therefore, there is an exception in the statute for two groups of late filers: the parents or guardians of children who will enroll in kindergarten the next year, and parents or guardians of children who have "good cause" for missing the January 1st filing deadline. Iowa Code sections 282.18(2) and (16)(1997).

The Legislature has defined the term "good cause" rather than leaving it up to parents or school boards to determine. The statutory definition of "good cause" addresses two types of situations that must occur after the January 1st deadline. That provision states that "good cause" means:

> a change in a child's residence due to a change in family residence, a change in the state in which the family residence is located, a change in a child's parents' marital status, a guardianship proceeding, placement in foster care, adoption, participation in a foreign exchange program, or participation in a substance abuse or mental health treatment program, or a similar set of circumstances consistent with the definition of good cause; a change in the status of a child's resident district, such as removal of accreditation by the state board, surrender of accreditation, or permanent closure of a nonpublic school, the failure of negotiations for a whole-grade sharing, reorganization, dissolution agreement, or the rejection of a current whole-grade sharing agreement, or reorganization plan, or a similar set of circumstances consistent with the definition of good cause. If the good cause relates to a change in status of a child's school district of residence, however, action by a parent or guardian must be taken to file the notification within forty-five days of the last board action or within thirty days of the certification of the election, whichever is applicable to the circumstances.

Iowa Code §282.18(16)(1997).

Although the State Board of Education has rulemaking authority under the open enrollment law, the rules do not expand the types of events that constitute "good cause". 281 Iowa Administrative Code 17.4.

The reasons given by the Appellants for filing the open enrollment application do not constitute “good cause” under the law and board rules. There have been many appeals brought to the Iowa Department of Education regarding the definition of "good cause" since the enactment of the open enrollment law. Only a few of those cases have merited reversal of the local board's decision to deny the applications. The State Board has refused to reverse a late application due to ignorance of the filing deadline, In re Candy Sue Crane, 8 D.o.E. App. Dec. 198 (1990); or for missing the deadline because the parent mailed the application to the wrong place, In re Casee Burgason, 7 D.o.E. App. Dec. 367(1990); or when a bright young man's probation officer recommended a different school that might provide a greater challenge for him, In re Shawn and Desiree Adams, 9 D.o.E. App. Dec. 157(1992); or when a parent became dissatisfied with a child's teachers, In re Anthony Schultz, 9 D.o.E. App. Dec. 381(1992); or because the school was perceived as having a "bad atmosphere", In re Ben Tiller, 10 D.o.E. App. Dec. 18(1993); or when a building was closed and the elementary and middle school grades were realigned, In re Peter and Mike Caspers, *et al.*, 8 D.o.E. App. Dec. 115 (1990); or when a child experienced difficulty with peers and was recommended for a special education evaluation, In re Terry and Tony Gilkinson, 10 D.o.E. App. Dec. 205 (1993); or even when difficulties stemmed from the fact that a student's father, a school board member, voted in an unpopular way on an issue, In re Cameron Kroemer, 9 D.o.E. App. Dec. 302 (1992). "Good cause" was not met when a parent wanted a younger child to attend in the same district as an older sibling who attended out of the district under a sharing agreement, In re Kandi Becker, 10 D.o.E. App. Dec. 285(1993). The Department recently denied a request to reverse a denial of open enrollment by a parent who had not received notice of the deadline and did not know it existed. In re Nathan Vermeer, 14 D.o.E. App. Dec. 83(1997).

Although the Kitzingers do not have good cause for the late filing of their application, Mr. Kitzinger makes a compelling argument that his application should be granted. As he stated, the Board has granted a number of late-filed applications in the past. Although, as Superintendent West testified, most of those requests were related to the change in whole-grade sharing partners, a divorce, or a change in residence, not all of them were, and the reasons for granting the requests was never articulated to the public. Two applications were granted in April and May of 1996. Neither of those applications had any special circumstances related to whole-grade sharing, change in residence, or change in a parent’s marital status. Furthermore, although Superintendent West testified that most or all of the late-filed applications were related to a whole-grade sharing change, change in residence, or change in marital status of the parents, this was not clear to the community. This is because the Board did not state the reasons it was granting

late-filed requests at Board meetings or in the Board minutes, and it did not state when exceptions would be granted in its written policy. The community's understanding was that the deadline for open enrollment applications did not matter. As a matter of fact, even Superintendent West did not know how the Board would vote until the June 24, 1997, Board meeting. In addition, one Board member was quoted in the paper on June 26, 1997, as stating, "It is now time to inform our public that we will adhere to those deadlines."

Although the Board had a written policy that required parents to file applications by the deadlines, the Board did not follow its own policies in prior years. Although the District published notice of open enrollment deadlines in the newspaper and school newsletters each year, it also did not adhere to the information published. Therefore, when the Board revised its written policy in September 1996 to change the deadline from October 30th to January 1st of each year, there was no way for any member of the public to know that the Board would follow this deadline. Also, there was no way for any member of the public to know that the Board would follow the deadlines published in the newsletter and newspaper in the fall of 1996. Until the vote in the Toenges case in June 1997, no one knew that the Board would change its prior "feeling", and deny the application. As a matter of fact, the Board itself tabled the Kitzinger application at the June meeting, because it wanted to consider whether to apply the denial to that application. Therefore, the Kitzingers had no way to know that late-filed applications would no longer be granted prior to the January 1, 1997, deadline.

Essentially, the Kitzingers' position is that since the Board granted prior late-filed applications, and in particular, granted two late-filed applications in April and May of 1996, that the Board's action to deny their application was arbitrary and capricious.

A local board has the authority to grant late-filed open enrollment applications, and it has the authority to deny them. However, it cannot act arbitrarily or capriciously. See, Iowa Code section 17A.19(8)(g)(1997); In re Dustin Krutsinger, 12 D.o.E. App. Dec. 346(1995); In re Danessa, Jeremiah, and Desiree Black, 11 D.o.E. App. Dec. 338(1994); In re Anthony Schultz, 13 D.o.E. App. Dec. 381(1993).

A school board has the authority to adopt policies and rules for its own governance and that of the district, its students and employees. Iowa Code section 279.8(1997). The only real limitation on the board's power is that the subject matter of the rule must be within the board's authority to govern, and the rule itself must be reasonable. Board v. Green, 259 Iowa 1260, 147 N.W.2d 854(1967). A school board does not have unfettered discretion, and must adopt policies to guide it in the exercise of its discretion. Krutsinger, supra, at 349. There are two reasons for the requirement that a board adopt policies: first, to put the district and all the constituencies on notice as to the

board's general views on a given subject so that those entities can govern themselves accordingly, and second, to guide the board in its own decision making. Krutsinger, supra, at 349; (citing In re Anthony Schultz, 9 D.o.E. App. Dec. 381(1992)).

In this case, the Board had a written policy that required filing applications by the open enrollment deadline, either by October 30th prior to 1996, or by January 1st after September 1996. However, the Board did not follow its own written policy.

> Board policies are seldom written in stone and can be amended as easily as they were adopted. Also, because the board creates the policies, it alone has the ability to deviate or make exceptions to the policies when an unanticipated fact situation occurs, or when wisdom would dictate a deviation is necessary. …
>
> We have no quarrel therefore, with the Board's decisions (at least two of them) to depart from their announced and existing policy on open enrollment and, particularly, late applications. The problem arises because the Board apparently made willy-nilly exceptions to its own policy. …
>
> However, no record exists of the reason for the departure in that case, so the community is not really on notice as to which of many possible rationales moved the Board to deviate from its policy. Nor was the policy amended after the action was taken.

In re Anthony Schultz, supra, at 385.

As in Schultz and Krutsinger, supra, at 349, the Board had the power to deviate from its own policy, but it had the obligation to state the facts that warranted such a departure. In that way, a waiver of the late-filing deadline would not be binding on subsequent situations unless they were identical to the fact pattern described by the Board when it deviated from its policy. In re Krutsinger, supra, at 349.

In this case, the Board did not state any reason for granting the exceptions to the open enrollment policy when it granted previous late-filed applications. Although Superintendent West testified that most of the late-filed open enrollment applications were granted because they were related to a whole-grade sharing agreement, a move by a parent, or a change in marital status of the parents, the public did not have any way to know this. Also, the Board granted two late-filed open enrollment applications in 1996, which according to the testimony of the District, apparently had no special circumstances. Therefore, as the Appellant testified, the community's understanding was that all late-filed open enrollment applications would be granted, since all late-filed open enrollment

applications had always been granted in the past. The Board changed its practice long past the January 1st deadline. Therefore, the denial of the open enrollment application of the Kitzingers was effectively arbitrary and capricious. In re Schultz, supra; In re Krutsinger, supra.

The term "arbitrary and capricious" means "without regard to established rules or standard." In re Krutsinger, supra, at 349; Churchill Truck Lines , Inc. v. Transp. Regulation Bd., 274 N.W.2d 295, 299-300(Iowa 1979). It implies that the decision was made upon whim, fancy, or some unarticulated preference. Krutsinger, supra, at 349. In this particular case, the apparent reason for the change in the Board's action, was that a new member had been elected to the Board. However, the change in the Board's position occurred in June and July of 1997. This is clearly after the January 1st deadline for open enrollment applications.

If a board wishes to change its position regarding late-filed open enrollment applications, it must do so in a manner which is reasonable and provides for notice to the parents in the District sufficient so that they will be able to file their open enrollment applications in a timely manner. This means that for boards that have previously granted late-filed open enrollment applications as a matter of policy, practice, or the "feeling of the Board," the board will need to clearly state in the minutes of a board meeting, and in written notices to the public, that they will no longer grant late-filed open enrollment applications. This action will need to be taken before the January 1st deadline, not after it has already passed. This will allow parents to have the opportunity to realize that the board will adhere to the deadlines, and that they must get their applications filed in a timely fashion. We agree with Superintendent West that a previous board cannot necessarily bind the actions of a subsequent board. We also note that a board may change its policy with respect to late-filed open enrollment applications. However, when it does so, it must do so in a manner that is reasonable, not arbitrary and capricious in effect, and which provides adequate notice to the public that it will adhere to the open enrollment deadlines. Adequate notice to the public means giving them notice in sufficient time so that parents may file applications by the deadlines.

We assume that the Titonka District will want to formally change its past practice with regard to late-filed open enrollment applications without good cause. If it wishes to do so, the Board should discuss what the policy will be in a public board meeting before January 1st. The decision of the Board and the discussion should be reflected in the Board minutes. If the Board will grant exceptions, it should state this in the policy. In addition, when the Board publishes notice of the open enrollment application deadlines this fall, it should clearly state that the District will no longer allow late-filed open enrollment applications, and parents who wish to open enroll their students must file by the January 1, 1998, deadline. In doing so, the District will provide adequate notice to parents that the District intends to follow the statutory deadlines with respect to the open enrollment law.

Because the Board's decision was effectively arbitrary, capricious, and unreasonable because of its timing, the hearing panel recommends that the Board's decision be overturned.

Iowa Code section 282.18 (4)(1997) and the departmental rules at 281 Iowa Administrative Code 6.11(7) allow the hearing panel and the administrative law judge to issue an oral decision at the conclusion of the hearing. Both parties agreed to this procedure, and an oral decision reversing the District Board's denial of open enrollment was issued at the end of the hearing.

All motions or objections not previously ruled upon are hereby denied and overruled.

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Titonka Consolidated School District made on July 14, 1997, which denied the Kitzingers' late-filed request for open enrollment for Jonathan for the 1997-98 school year, is hereby reversed. There are no costs of this appeal to be assigned.

_____ _____

DATE AMY CHRISTENSEN, J.D.
ADMINISTRATIVE LAW JUDGE

IT IS SO ORDERED.

_____ _____

DATE TED STILWILL
DIRECTOR