IOWA STATE BOARD
OF EDUCATION
(Cite as 14 D.o.E. App. Dec. 123)

In re Charles Ashley, *et al*.*	**:**	
Mary Ashley, *et al**., Appellants,	**:**	
v.	**:**	DECISION
Des Moines Independent Community School District, Appellee.	**:**	
		[Admin. Doc. #s**]

The above-captioned matters were consolidated and were heard together on April 30, 1997 before a hearing panel comprising Dr. Tom Andersen, consultant, Bureau of Administration, Instruction and School Improvement; Dr. Gary Borlaug, consultant, Bureau of Practitioner Preparation and Licensure; and Amy Christensen, J.D., designated administrative law judge, presiding. The following appellants were present: Ms. Shanda Abel, Mrs. Mary Ashley, Mr. David Elkin and Mrs. Andrea Crabb-Elkin, Ms. Michelle Gilligan and Mr. Brian Gilligan, Mr. Patrick Krohn and Mrs. Mary Krohn, Mr. Ronald and Mrs. Sheri Meendering, Ms. Diane Meisenheimer, Mr. Richard Potts, Jr. and Mrs. Stacy Potts, Mr. Wayne Price, Mrs. Kristen Silver, and Ms. Denise Spencer. Appellants Ms. Jodi Moore and Ms. Tricia Tedesco-Peterson did not appear at the hearing. All the Appellants were unrepresented by counsel, although Mr. Elkin is an attorney and represented himself. The Appellee, Des Moines Independent Community School District [hereinafter, "the District"], was present in the person of Dr. Thomas Jeschke, Executive Director for Student Services. The District was unrepresented by counsel.

An evidentiary hearing was held pursuant to Department Rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for the appeals are found at Iowa Code sections 282.18(3) and 290.1(1997). The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the consolidated appeals before them.

The Appellants seek reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on January 21, 1997, which denied their applications for open enrollment out of the District, beginning in the 1997-98 school year.

***"*et. al*." means "and others."**

****Adm. Doc. #s 3833, 3839, 3846, 3852, 3853, 3854, 3858, 3859, 3860, 3862, 3865, 3867 and 3868.**

I.
FINDINGS OF FACT

Notices of Hearing were sent by the Department of Education to all Appellants, including Jodi Moore and Tricia Tedesco-Peterson, by certified mail, return receipt requested. The Department has return receipt cards showing service of the Notice of Hearing on all Appellants, including Ms. Moore and Ms. Tedesco-Peterson. Ms. Moore and Ms. Tedesco-Peterson did not appear at the hearing, did not send a representative, and did not move for a continuance.

All Appellants timely filed applications for their children to open enroll out of the Des Moines District to attend kindergarten elsewhere during the 1997-98 school year.

The District has a formally adopted open enrollment/desegregation policy and plan. The policy prohibits granting open enrollment when the transfer would adversely impact the District's desegregation plan. The policy contains objective criteria which the District uses to determine whether a request for transfer would adversely affect the desegregation plan. It also contains objective criteria the District uses to prioritize those requests for transfer deemed not to have an adverse impact on the desegregation plan.

The District determined eligibility or ineligibility of each applicant for open enrollment on a case-by-case basis pursuant to the District's open enrollment and desegregation policies. Each child's racial status was verified. Then the ratio of minorities to nonminorities at the child's attendance center was determined. It was then determined whether the child had siblings previously approved for open enrollment.

The District does not consider parents' reasons for requesting open enrollment. The application form does not provide a place for parents to state reasons, so the District does not know why parents requested open enrollment. If the parents attach information to the form regarding reasons for requesting open enrollment, the District considers those reasons to determine if the applicant meets the hardship exception contained in the District's open enrollment/desegregation policy. Several parents at the hearing expressed frustration at their inability to state a reason for requesting open enrollment on the form.

The application form for open enrollment is prepared by the State Department of Education, not by the local school district.

The District's open enrollment/desegregation policy (Policy Code No. 639) contains a hardship exception. The policy states as follows: "Hardships may be given special consideration. Hardship exceptions may include, but are not limited to, a change in a child's parent's marital status, a guardianship proceeding, adoption, or participation in a

substance abuse or mental health treatment program." The District interprets this exception narrowly. Dr. Jeschke testified that it includes things such as submittal of a letter from a psychiatrist stating the child's presence in a particular setting would be detrimental. The policy including the hardship exception is sent to each family with the open enrollment application.

The Appellants in this case were not considered for hardship exceptions. The District did not know of their circumstances, since there was no place on the application form to state them, and no parent attached information to the form which the District could have evaluated.

All the Appellants are among the group of nonminority students deemed ineligible by the District for open enrollment because their transfer would adversely affect the District's desegregation efforts. The action to deny the applications for open enrollment was taken by the Des Moines Board at their meeting on January 21, 1997.

For the 1996-97 school year, minority enrollment in the Des Moines District was 25.2 %. In the portion of the District's desegregation plan at issue in this case, the District developed a composite ratio of minority to nonminority students for the district as a whole in the fall of 1996. The ratio is based on the district's official enrollment count taken in September. The district determined that since 25.2% of students in the District were minorities, and 74.8% of the students in the District were nonminorities, the composite ratio was 1:2.97 (74.8 divided by 25.2). 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, 2.97 nonminority students will be granted open enrollment.

The parent determines the minority status of the child. In the application for open enrollment, parents are to check one of the following categories: white/not Hispanic, black/not Hispanic, Asian/Pacific Islander, Hispanic, or American Indian/Alaskan Native. All of the children of the Appellants in this case are nonminority students. If there is a question regarding a child's race, the parent may be asked to verify the race of the child.

Ten applications for open enrollment out of the District were submitted by minority students for the 1997-98 school year. Using the composite ratio of 1:2.97, the District determined that 29 nonminority students would be eligible for open enrollment for the 1997-98 school year. (10 x 2.97 = 29.7) The District has a policy of dropping down to the next whole number, since there could not be .7 of a student. The only exception to this is if the last student on the list has a sibling requesting open enrollment, the sibling will be allowed to open enroll so as not to split the family.

There were 149 applications for open enrollment out of the District for the 1997-98 school year. Ten of these were minority applications. 139 were nonminority applications. 12 of these 139 nonminority applicants were determined to be ineligible for open enrollment under another provision of the desegregation policy not at issue in this case. This left 127 nonminority applicants to fill 29 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. There were 18 applicants with siblings who had previously been allowed to open enroll out of the District. This left 11 positions, and 109 applicants.

The District randomly assigned numbers to these remaining 109 applicants, with siblings being placed together, and they were placed on a list in numerical order. The first 11 children on the list were allowed to open enroll. The remainder of the students were placed on a waiting list. All of the Appellants in this case are on the waiting list. The waiting list will be used only for the 1997-98 school year. If other minority students leave the District through open enrollment, the students at the top of the waiting list will be allowed to open enroll in numbers according to the composite ratio.

Based on the open enrollment/desegregation plan, the Board determined that transfer of these students on the waiting list out of the District would adversely affect the District's desegregation plan.

The District's practice of denying open enrollment applications under 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, AA2432, filed June 1, 1995.

Parents may open enroll their children to another school within the District if they are unhappy with a particular attendance center, unless the building is closed to open enrollment under another provision of the District's policy not at issue in this case. This provision would not allow nonminority students to exit or minority students to enter the particular building because the school's minority population exceeds the District's minority percentage by more than 15 percentage points. Thus, any building with a minority population of 40.2% or greater is closed to open enrollment. The only buildings closed to open enrollment for the 1997-98 school year are Brooks, Edmunds, King, Perkins, Lovejoy, McKinley, Moulton, Wallace, Harding, and Hiatt. Therefore, although parents may be denied open enrollment out of the District, they may still open enroll to another school within the District unless their child would attend one of the listed schools.

If parents want their child to attend school out of the district, they may pay tuition to the receiving district and have their child attend, thus circumventing the open enrollment process and any desegregation plan.

In re Afton Abel

Afton Abel's mother, Ms. Shanda Abel, applied for open enrollment for her daughter for the following reasons. Ms. Abel is a full time nanny for a family who lives in West Des Moines, and whose children are students at Crossroads Park Elementary School in West Des Moines. Ms. Abel is responsible for getting her employer's children ready for school, transporting her employer's children to and from school and school activities, and must be available during the day for emergencies. Ms. Abel's employer testified on her behalf. The Abels live on the south side of Des Moines, and Afton would attend kindergarten on the south side of Des Moines at Mitchell Elementary. It would be extremely difficult, if not impossible, for Ms. Abel to take her employer's children to and from school in West Des Moines and to their other activities, take her daughter to and from school on the south side, and be available for emergencies, because of the distance between West Des Moines and the south side of Des Moines. It is approximately ten miles from the Abel home to the employer's home. Ms. Abel and her employer testified her job may be terminated because she could not fulfill her job responsibilities, unless Afton could attend the same school, or one in close proximity to, the employer's children. Ms. Abel filed for open enrollment so her daughter could attend school in West Des Moines.

Ms. Abel could apply for within District open enrollment to a school on the west side of Des Moines, such as Windsor or Cowles Elementary.

In re Charles Ashley

Ms. Mary Ashley, mother of Charles, applied for open enrollment to the West Des Moines District for the following reasons. The Ashleys live on the northeast side of Des Moines, and Charles would attend kindergarten at Madison Elementary, 806 East Hoffman. Ms. Ashley has a disability, and is enrolled in the Supported Employment Program through Goodwill Enterprises. The Supported Employment Program assists persons with disabilities so they may find jobs, be successful in them, and become self-supporting. Ms. Ashley has been employed at Formative Years daycare in West Des Moines for about two years. When she first started her job, a job coach worked with her most of the time to learn the job with her and assist her in many ways. Jennifer Clement, Ms. Ashley's employment counselor with Goodwill Industries, testified on Ms. Ashley's behalf and assisted her at the hearing. A considerable effort has been made by Ms. Ashley herself and by others working with her to find her employment and to achieve success at her job. Her employer is happy with her, she is happy at her job and she is doing very well at it. She and her family need the income from this job. This is the first time Ms. Ashley has been able to hold a job for this long and be self-supporting. She had one prior placement through the Supported Employment Program which was not nearly as successful as

this one. Because of her particular situation, it would be extremely difficult for Ms. Ashley to find other employment and be successful at it, and it would be expensive for the Supported Employment Program.

Charles attends daycare at Formative Years while Ms. Ashley is working, and receives daycare and speech therapy at reduced prices through Formative Years. Speech therapy and daycare would be too expensive for the family without the discount. The speech therapy is given at Crestview Elementary. Formative Years transports children to West Des Moines schools. It does not transport children to the Des Moines schools. When Ms. Clement asked Formative Years about transportation for Charles, they said they would only transport him to West Des Moines schools. If Charles is denied open enrollment and has to attend half day kindergarten at Madison, Ms. Ashley would have to quit her job to provide transportation and child care for her son.

In re Steffanie Ann Elkin

David Elkin and Andrea Crabb-Elkin, parents of Steffanie, requested open enrollment to the Indianola District for their daughter for the following reasons. Steffanie would attend kindergarten at Jackson Elementary, although the school is overcrowded, and she may have to be transported by the District to another school. Mr. Elkin is an attorney working full time. Mrs. Crabb-Elkin is a teacher in the Indianola School District. If she were allowed to open enroll, Steffanie could attend school in the same building in which her mother teaches. Neither parent is available to transport Steffanie to and from school on a regular basis, and it would be difficult for them to be available in case of emergency. Steffanie has attended daycare in Indianola with her younger brother, and attended preschool in Indianola. If she attended school in Indianola, she would remain at the same daycare. To require her to leave her daycare provider and attend school in Des Moines would cause hardship for the family regarding transportation and in emergencies, and emotional distress for Steffanie. Steffanie has a partial hearing loss which requires her to be evaluated every three months. The Elkins stated it would be much more difficult to have Steffanie evaluated if she attends school in Des Moines.

The Des Moines School System could provide Steffanie with necessary hearing loss evaluations and would provide any necessary transportation.

In re Connor Gilligan.

Michelle and Brian Gilligan, parents of Connor, applied for open enrollment for the following reasons. Connor has just turned five, and would attend kindergarten at Rice-Monroe Elementary School in the Des Moines District. Connor attends the Formative Years Day Care. Formative Years would transport Connor to and from school in the the Urbandale District if he

were allowed to open enroll. Formative Years will not transport to Des Moines schools. Connor has a disability which affects his ability to walk. He goes to physical therapy twice a week. His physical therapy is four to five blocks from his current day care. Connor's grandparents live in the Urbandale School District, and help out with transportation to physical therapy. Connor is starting to become sensitive to other children's noticing the way he walks. Connor will have major surgery coming up at Shriner's Hospital, and his grandparents will help with that. Connor will spend a lot of time after the surgery with his grandparents, because his mother works full time. Connor's mother cannot transport him to and from school. She works full time and her hours vary a great deal. She is at work until at least 6:30 p.m. every night. Connor's parents were getting a divorce the day after the hearing in this case. The parents will have joint legal custody. Connor will live with his mother, and will continue to spend time with his grandparents and father. Mr. Gilligan will be living with his parents in Urbandale. Mr. Gilligan cannot transport Connor to and from school because he works full time and cannot leave work.

It would be too hard for Connor to live through his parents' divorce, his own surgery, deal with his own disability, start kindergarten, and have to change day care as well. It is crucial at this point in his life for Connor to continue the support of the staff and friends he has made at Formative Years Day Care.

The Gilligans did not apply for a hardship exception, because there is no place on the application form to apply for one, and they did not learn of this exception until the hearing on April 30, 1997.

In re Kyle Krohn

Kyle's parents, Patrick and Mary Krohn, applied for open enrollment for Kyle into the Southeast Polk Community School District for the following reasons. They applied for open enrollment based on considerations regarding both of their children: Kyle, who is currently 4 years of age, and Nick, who is currently 2 years old. Kyle would attend Pleasant Hill Elementary School in the Des Moines District. Kyle currently attends full time day care/preschool in an open-walled classroom[1] setting. He is easily distracted.

Nick's day care is on the Southeast Polk bus line. The day care provider does not transport to Pleasant Hill Elementary School. The Krohns would like Kyle to be able to go to the same day care as Nick when Kyle is not in school. If Kyle has to go to Pleasant Hill Elementary, he would have to go to separate day care from his brother, or his parents would have to take Nick out of the day care he has been at since he was a baby. Nick is very close to his current babysitter. The parents do not want to lose their current day care provider.

[1] Open and closed classrooms refer to whether the school building has walls which reach all the way to the ceiling surrounding each of the classrooms. An open classroom is one in which the walls are either nonexistent or reach only part way to the ceiling.

His parents cannot transport Kyle to and from Pleasant Hill Elementary School. Mrs. Krohn works full time in Ft. Dodge. Mr. Krohn also works full time and could not transport the children to and from school.

Mr. and Mrs. Krohn are somewhat unhappy with Pleasant Hill Elementary School for a number of reasons. Primarily, Pleasant Hill Elementary has open-walled classrooms, and Southeast Polk has closed-walled classrooms. Pleasant Hill Elementary offers a 2 ½ hour kindergarten, while Southeast Polk has full-day kindergarten. The parents feel that Kyle would excel better at Southeast Polk.

Kindergarten is not a requirement in the Des Moines Independent Community School District. If the parents wish, they may leave Kyle in his current day care/preschool situation. However, Mr. and Mrs. Krohn feel that Kyle is ready for kindergarten and they do not want to hold him back another year.

In re Graham Meendering

Mr. and Mrs. Meendering have two children: Graham, who is five, and Hannah, who is one. Graham would attend kindergarten at Hillis Elementary in the Des Moines District. His parents want to open enroll him to the Urbandale School District for the following reasons. The Meenderings are concerned about class size of the kindergartens in the Des Moines District versus those in the Urbandale District. The Urbandale District has guaranteed that there will be no more than 18 students per kindergarten classroom. The Des Moines District has no guarantee like this. The facilities in Urbandale are newer and more modern. Graham's parents feel that his transition to kindergarten would be easier if he went to the Urbandale Schools. Mrs. Meendering formerly worked in the Urbandale Schools and knows the staff and the administration. Graham attended day care in the buildings where his mother worked in the Urbandale Schools, so he is familiar with Urbandale School buildings. Graham has friends who will go to Urbandale Schools. Hanna is currently enrolled in Urbandale day care. Graham has been enrolled in the summer program in the Urbandale Schools, because his parents felt this would better prepare him for kindergarten. In summary, the parents feel that the best learning environment for Graham is in the Urbandale Schools.

Hillis Elementary, where Graham would attend, is one of the Des Moines District's newest schools and the facility is excellent.

In re Cassidy Kimmel

Ms. Diana Meisenheimer applied for open enrollment for her daughter Cassidy to attend Olmstead School in the Urbandale District for the following reasons. Cassidy would attend kindergarten at Moore Elementary in the Des Moines District. Ms. Meisenheimer is a single parent, and has remarried. Cassidy does not adapt well to going back

and forth between her divorced parents. Ms. Meisenheimer feels Cassidy needs consistency in her daycare and school environment. Cassidy has seen a child psychologist, and the psychologist recommended Cassidy stay in a stable environment. No letter from the psychologist was presented at the hearing. Ms. Meisenheimer believes Olmstead School and the before and after daycare program provided at Olmstead would be better for Cassidy for a number of reasons. Des Moines District daycare offers childcare only when school is in session, so Cassidy would have to attend daycare somewhere else during spring vacation and during the summer. Olmstead offers spring vacation daycare and a summer program so Cassidy could stay in the same daycare. Ms. Meisenheimer was more impressed with the director and staff of the daycare program at Olmstead. Ms. Meisenheimer and Cassidy's stepfather both work full time. Cassidy's grandfather lives a few blocks away from Olmstead School, and could pick her up in emergencies when her parents are at work. Ms. Meisenheimer has heard nothing but good things about the schooling Cassidy would receive at Moore, and is seeking open enrollment because of the difference in before and after school daycare.

In the Des Moines School Board minutes, the Board has Cassidy listed as being in the Mann attendance area. This is incorrect, although it does not make any difference in the decision to deny open enrollment made by the Board.

In re Joseph Potts

Mr. and Mrs. Potts applied for open enrollment for their son to the Waukee District for the following reasons. Joseph would attend kindergarten at Studebaker Elementary in the Des Moines District. Joseph attends daycare a few blocks from his father's place of employment in Waukee. Mr. Potts was formerly transferred often, and took his current position to eliminate the frequent transferals, to provide stability for Joseph. At the time Mrs. Potts took her current position, she was required to live in Polk County, so the family could not buy a house in Waukee. Mr. Potts has the flexibility to leave work if he needs to, and it is harder for Mrs. Potts to do so. Joseph's grandmother and uncle are also nearby in Waukee and can help out with transportation if needed. Mr. Potts takes Joseph to daycare full time, and the Potts are very happy with their current daycare. The daycare provider would transport Joseph to and from school in Waukee, and would provide daycare before and after school. The Potts believe it would be in Joseph's best interest to stay in the same daycare and attend school with his friends in Waukee. They believe Joseph's well being should take precedence over the negative impact his exit may have on the District's desegregation plan.

In re Tanner Price

Mr. and Mrs. Price applied for open enrollment for their son Tanner for the following reasons. Tanner would attend kindergarten at Moore Elementary in the Des Moines District. The Prices would like Tanner to attend school in the Johnston District.

Tanner has attended daycare at Village Square Day Care in Johnston since he was born. The Prices are very happy with the quality of care he has received. Village Square does not bus to and from Des Moines schools. The Prices work full time, and cannot transport Tanner to and from school. Mrs. Price travels the State in her position, and Mr. Price is in a service truck throughout the day, so neither is able to pick up Tanner during the day-time. There are no other accredited daycare providers in the Price's neighborhood. Mr. Price's sister works in Johnston, and she helps pick up Tanner. Tanner has been attending full time daycare his entire life. He would attend half day kindergarten, and then would require daycare for the remainder of the day. It would be extremely difficult for the Prices to find good daycare in their neighborhood. The Prices understand that Moore is a very good school, but the two and one half hours he would be in kindergarten are not the entire situation. Tanner will spend more time in daycare than he will in kindergarten, and the Prices are very concerned about the quality of care he will receive when he is not in school. The Prices, therefore, believe it would be in Tanner's best interest to stay in his current daycare and attend Johnston schools.

Before-and-after school daycare is provided at Moore, although it is not provided for half day kindergarten students. All day kindergarten is provided for only 24 students at Moore, and many of those students are bused in from other areas, so the chance that Tanner could get into the all day kindergarten program is small. Therefore, the Prices did not sign up for the lottery for all day kindergarten.

Mr. Price was angry that there was no place on the open enrollment application form to give a reason for the open enrollment request, and that the only thing that mattered was the color of his child's skin. He believes the form should be changed back, so parents have a feeling that someone else is also concerned about what is best for their child.

In re Kelly Silver

Ms. Silver applied for open enrollment for her son, Kelly, to the Southeast Polk School District for the following reasons. Kelly would attend kindergarten at Douglas Elementary in the Des Moines District. Kelly attends daycare in Altoona. The Silvers are very happy with this daycare provider, and will send their second child there as well once the child is born. Mr. and Mrs. Silver both work full time and cannot transport Kelly to and from school. Their daycare provider will not transport Kelly to and from Douglas Elementary, but will transport him to Southeast Polk schools. Kelly could continue at his current daycare and attend Southeast Polk schools. The Silvers are not unhappy with Douglas school or the Des Moines District. Their request for open enrollment is based on their need for quality daycare which will transport their son to school.

The Silvers have experienced a number of different daycare providers for Kelly and have had a number of problems. They have investigated a number of daycare options in their area and were very happy when they found their current dependable provider.

The Silvers also want Kelly to continue to attend the same daycare as his new sibling. This makes it even more difficult to find a good situation. Douglas Elementary does not have before-and-after school daycare for half-day kindergarten students.

Mrs. Silver realizes that Kelly does not have to go to kindergarten, but he is ready and they want him to attend. All his friends are going. The Silvers believe it would be in Kelly's best interest to stay at the same daycare provider he attends now and attend school in the Southeast Polk District.

Mrs. Silver is upset because the only fact considered in her application was the color of her son's skin, and the District does not consider the best interest of the child and family when granting or denying open enrollment. She believes it is not fair that her child cannot open enroll because of the color of his skin. When she got the open enrollment form and there was no place for parents to put a reason for the request, Mrs. Silver felt no one cared about their personal needs and reasons. She also believes it is unjust that if she sent her child to private school or paid tuition to Southeast Polk, her child could leave the Des Moines District. Therefore, she believes denial is a money issue, because so long as the money remains in the District, her son could leave. She believes open enrollment ought to be on a needs basis, and should be fair to everyone.

In re T.J. Spencer

Ms. Spencer applied for open enrollment for her son Timothy to the Saydel School District for the following reasons. Timothy would attend kindergarten at Madison Elementary in the Des Moines District. Timothy is in the Headstart program at Cornell. Ms. Spencer is a single parent and works full time. She cannot transport Timothy to and from school. Her mother provides daycare for Timothy and two other grandchildren. One of the other children will attend the Headstart program next year at Norwoodville. Ms. Spencer and her mother would like to have all the children attend the same school, and the only option, if one child is in the Headstart program at Norwoodville, is at Norwoodville School in the Saydel District. Ms. Spencer believes her son would get a better education if he stays at Norwoodville, and it would be more convenient for her mother to have all three children at the same school.

Ms. Spencer's mother, Patricia Ruden, appealed the denial of open enrollment for her grandson, and this is discussed in the Bales v. Des Moines case heard on the same day as this case.

Ms. Spencer has the option to apply for open enrollment to another school within the Des Moines system to keep at least two of the children together at the same school.

II.
CONCLUSIONS OF LAW

Ms. Jodi Moore and Ms. Tricia Tedesco-Peterson were properly served with Notice of the Hearing. They did not appear at the hearing, did not send a representative, and did not move for a continuance of the hearing. Therefore, the appeals for Ms. Moore and Ms. Tedesco-Peterson are hereby dismissed.

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 children under the open enrollment law, and the requirement that school districts affirmatively act to eliminate segregated schools. The Open Enrollment statute sets out these two interests, and provides as follows.

Iowa Code section 282.18(1)(1997) states, "It is the goal of the general assembly to permit a wide range of educational choices for children enrolled in schools in this state and to maximize ability to use those choices. It is therefore the intent that this section be construed broadly to maximize parental choice and access to educational opportunities which are not available to children because of where they live."

Iowa Code section 282.18(3)(1997) states, "in all districts involved with voluntary or court-ordered desegregation, minority and nonminority pupil ratios shall be maintained according to the desegregation plan or order. The superintendent of a district subject to voluntary or court-ordered desegregation may deny a request for transfer under this section if the superintendent finds that enrollment or release of a pupil will adversely affect the district's implementation of the desegregation order or plan. If, however, a transfer request would facilitate a voluntary or court-ordered desegregation plan, the district shall give priority to granting the request over other requests."

Iowa Code section 282.18(12)(1997) states, "The board of directors of a school district subject to voluntary or court-ordered desegregation shall develop a policy for implementation of open enrollment in the district. The policy shall contain objective criteria for determining when a request would adversely impact the desegregation order or plan and criteria for prioritizing requests that do not have an adverse impact on the order or plan."

Iowa Code section 282.18(18)(1997) states, "Notwithstanding the general limitations contained in this section, in appeals to the state board from decisions of school boards relating to student transfers under open enrollment, the state board shall exercise

broad discretion to achieve just and equitable results which are in the best interest of the affected child or children."

As the parents in this case point out, the Open Enrollment Law gives parents a great deal of choice in the schools their children may attend. Originally enacted in 1989, the Open Enrollment Law has been amended several times, and has progressively given parents more and more ability to open enroll their children in the schools they prefer. In re Evan Wiseman, 13 D.o.E. App. Dec. 325. In fact, although parents are required to fill out an "application" for open enrollment, the term application is a misnomer, and the sending school district may not deny the application, unless the transfer of the student will negatively impact the district's desegregation plan. Id. This is the reason the requirement that parents state a reason for the request on the application was taken out of the statute in 1996. Compare Iowa Code 282.18(2)(1995) with section 282.18(2)(1997).

In this case, the parents have very important and valid reasons for requesting open enrollment for their children. We are very sympathetic to the difficulties encountered by families where both parents work. As was pointed out by several parents, good dependable childcare is critical to their children's well being, and is difficult to find, particularly for families with more than one child. The Des Moines District has developed before-and-after school care programs, which helps alleviate these problems, but daycare for half-day kindergarten students is not available. All-day kindergarten is offered by the District, but the number of children served is limited. These parents are genuinely interested in what is best for their children, and are seeking to obtain it by filing for open enrollment.

If the Des Moines District did not have a desegregation plan, there would be no question that these parents could open enroll their children as requested, so long as the applications were filed in a timely manner. However, the District does have such a plan. It contains the objective criteria required by Iowa Code section 282.18(12)(1997).

Segregation of children in public schools solely on the basis of race denies the children of the minority group equal protection of the law guaranteed by the Fourteenth Amendment of the U.S. Constitution, even when the physical facilities and other "tangible" factors are equal. Brown v. Bd. of Education of Topeka, 347 U.S. 483(1954)(Brown I). Race discrimination in public schools is unconstitutional. Brown v. Board of Education of Topeka, 349 U.S. 294(1955)(Brown II). School authorities have the primary responsibility to recognize, assess, and solve these problems. Id.

Sixteen years after Brown II, the U. S. Supreme Court stated very clearly that school districts must take affirmative steps to integrate their schools, when it said:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown II. That was the basis for the holding in Green [391 U.S. 430(1968)] that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch'. 391 U.S. at 437-38.
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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 Des Moines District developed its desegregation policy to conform to these requirements, to conform to the requirements of Iowa Code section 282.18(12)(1997), and to follow the State Board's rule and guidelines on nondiscrimination. Current guidelines are contained in *The Race Equity Review Process*, adopted April 12, 1990. The District began desegregation efforts in 1967 with establishment of an Equal Educational Opportunity Committee. Desegregation Plan, A Blueprint for Integration, revised June 1993, at p.1; Des Moines Independent School District v. Iowa Dept. of Education, Ruling on Petition for Judicial Review, June 1, 1995. In 1973, the District was notified by the Iowa Department of Public Instruction that 13 schools within the District were in violation of the State Guidelines on Nondiscrimination. Id. In 1974 and 1975, the federal government investigated the Des Moines District's desegregation/integration and nondiscrimination practices. Id. at p. 2. The U.S. Office of Civil Rights in Education issued a letter of non-compliance to the District as a result of the investigation. Id. The District settled the non-compliance by signing a Memorandum of Understanding with the U.S. Office of Civil Rights in Education, which was approved on November 16, 1976. Id. The Memorandum required the District to take affirmative steps to integrate schools in the District. Id. Among other things, the District committed to compliance with the State Guidelines on Non-Discrimination, which state that no school building may have a minority student population more than 20 percentage points above the district-wide minority student percentage. Id. The District currently has some buildings which are still not in compliance with the State Board Guidelines, and minority population in those buildings is greater than 20% above District-wide average percentages. Board Minutes, January 21, 1997.

The District's desegregation plan encourages and supports the elimination of factors which may cause the District's minority population to increase at a greater rate than that of surrounding suburban districts. Statistics show that while the percentage of minority students is increasing in the Des Moines District, it is remaining steady or decreasing in surrounding suburban districts. Id.; Des Moines Board Policy 639, Open Enrollment.

Between 1989 and 1993, open enrollment transfers out of the District increased the minority student percentage in the District. Of 572 students requesting open enrollment to surrounding districts, 535 (93.5%) were non-minority students, and 37 (6.4%) were minority students. (During the 1992-93 school year, there were 79.5% non-minority and 20.5% minority students in the District.) 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). Board Policy No. 639, Open Enrollment. Among other things, for buildings with a minority student population greater than 15 percentage points above the District's minority percentage, nonminority students may not transfer out of the building. This portion of the District's policy was upheld by the State Board of Education in In re Shawna and Joshua Barnett, 10 D.o.E. App. Dec. 35, and discussed and approved by Judge Bergeson in his Ruling on Petition for Judicial Review, Des Moines Independent School District v. Iowa Department of Education, June 30, 1995. The policy also contains a composite ratio provision, 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. This provision was also upheld by Judge Bergeson in his Ruling.

Some of the parents raised the issue of reverse discrimination, and stated they and their children were being discriminated against because they were white, since the students would have been allowed to transfer out of the District if they were minorities. Judge Bergeson addressed this issue in his Ruling, and upheld the District's policy. The District's open enrollment/desegregation policy imposes race-conscious remedies to further its desegregation efforts. Use of race in this manner is not prohibited. Des Moines Independent School District v. Iowa Department of Education, Ruling on Petition for Judicial Review, June 30, 1995. The question to be asked is whether the classification "serves important governmental objectives" and is "substantially related to achievement of those objectives". Id. As Judge Bergeson found, the District's "interest in achieving and maintaining a racially integrated, diverse school system is compelling". Id. "The

District is justified in implementing a desegregation plan given its history and its present inability to meet state nondiscrimination guidelines." Id. "The District's policy does not prefer one race over another. While the policy may have differing impacts, depending on the number and race of students applying for open enrollment, it does not prefer or advance one race over another." Id. The analysis to be used is to determine whether the policy is substantially related to an important governmental objective. Id. "[T]here are numerous benefits in operating a racially integrated school system", and "the District has a compelling interest in achieving and maintaining integration given the facts underlying this case." Id. The second part of the analysis is to determine whether the District's plan is substantially related to this compelling governmental interest. Id. Judge Bergeson found that the part of the District's policy which prevented minority students from transferring out of buildings with minority enrollments less than the District's average was not substantially related to the governmental interest. Id. However, he approved the finding by the State Board that closing buildings to transfer out by non-minority students when the buiding's minority population exceeds the District's by more than 15% is reasonable and sufficiently narrowly tailored. Id. He also upheld the District's composite ratio portion of the policy. Id.

The circumstances have not changed since Judge Bergeson's Ruling two years ago. The District continues to have buildings with minority percentages more than 20% above District percentages, and the minority population of the Des Moines District remains significantly higher than that of surrounding districts. Therefore, the compelling governmental interest of the District remains, the remedies upheld by Judge Bergeson as substantially related to the important governmental interest are the same, and the allegations of reverse discrimination by some of the parents therefore fail.

Some of the parents questioned how transfer of their children could impact the District's desegregation plan, since their children's older siblings have attended private schools, and these children would attend private kindergarten if not allowed to open enroll. 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." In this case, the parents were not trying to circumvent the desegregation plan by enrolling their children in private schools. However, the good intentions of these particular parents do not mean that the State Board and the District should create a loophole which could gut the District's desegregation efforts. In addition, the District uses the entire student population in an attendance area, not just students who actually attend, to make planning and staffing decisions. Therefore, the Dis-

trict correctly determined that even though these children's siblings have been attending private school and these children may attend private kindergarten if not allowed to open enroll, their transfer out of the District could negatively impact the District's desegregation plan.

With respect to the students involved in this case, the District followed its open enrollment/desegregation policy, and determined that transfers of the students at issue in this case would have an adverse impact on the desegregation policy. We agree with that determination.

Some of the parents raised the issue that application of the desegregation plan restrictions is unfair, because if they could afford to pay out of district tuition, they could exit. Therefore, they argue, "white flight" is available to those who can afford to pay for it. We agree that this is unfair. However, Iowa law has always allowed parents who paid tuition to send their children to school in any district. This was the state of the law prior to the existence of the open enrollment statute. The open enrollment statute equalizes the situation in most cases, because most districts do not have a desegregation plan. Allowing parents to leave a district with a desegregation plan, and thereby negatively impact the desegregation plan, is not justified by the unfairness of parents being able to pay for their children to exit the district. It is also not in accordance with Iowa Code section 282.18(3)(1997).

Thus we have a conflict between the right of parents to choose their children's schools, and the constitutional requirement of integration and the obligation of the District to implement it. Some of the parents state that their children's best interest should override the District's composite ratio, and point to Iowa Code section 282.18(18)(1997), which states that "Notwithstanding the general limitations contained in this section, in appeals to the state board from decisions of school boards relating to student transfers under open enrollment, the state board shall exercise broad discretion to achieve just and equitable results which are in the best interest of the affected child or children". Section 282.18(1) states the intent to construe the open enrollment statute broadly to "maximize parental choice and access to educational choices not available to children because of where they live". These two sections of the open enrollment statute are in conflict with section 282.18(3), which states that in districts with desegregation plans, nonminority and minority pupil ratios are to be maintained according to the plan, and districts may deny requests for open enrollment if the transfer would adversely impact the desegregation plan.

The question presented is whether the provisions of the statute which provide for parental choice and State Board discretion override that provision which allows a district to deny open enrollment if it finds the transfer would adversely impact the district's desegregation plan. While Judge Bergeson's Ruling seems to indicate they do not, the Judge did not specifically address the question. Therefore, we do so here.

When determining the meaning of a statute, we first must decide if it is ambiguous. If it is not, we apply the plain meaning of the statute. In this case, the individual sections of the statute are not ambiguous when considered separately. However, when they are considered together, the ambiguity arises. The sections of the statute conflict. Therefore, we apply the rules of statutory construction. Citizen's Aide/Ombudsman v. Miller, 543 N.W.2d 899, 902 (Iowa 1996).

If a general provision of a statute conflicts with a special provision, they are to be construed to give effect to both if that is possible. If it is not, the special provision prevails as an exception to the general provision. Iowa Code section 4.7 (1997). In this case, sections 282.18(1) and 282.18(18) apply generally to all open enrollment cases. Section 282.18(3) applies only to those districts which are subject to voluntary or court-ordered desegregation plans. It is not possible to reconcile these provisions to give effect to both. Either the parents and the State Board are given broad discretion to choose the school district for these children, or the Des Moines District is allowed to deny their requests for open enrollment because their leaving the District would have an adverse impact on the District's desegregation plan. Therefore, under this rule of statutory construction, section 282.18(3) would prevail only as to those districts subject to a desegregation plan. This is an exception to the general rule, which is that parents are given wide choice as to schools (282.18(1)), and that in appeals to the State Board, the State Board is to exercise broad discretion to achieve just and equitable results in the best interest of the affected child or children (282.18(18)).

On the other hand, there is a second rule of statutory construction, which states that "If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails." Iowa Code section 4.8. In this case, the open enrollment statute was enacted in 1989, and included both 282.18(1) and a predecessor to 282.18(3). The language which allows a district to deny open enrollment if there is an adverse impact on the desegregation plan was added in the 1991 Code. Section 282.18(18) was not added until 1992. According to this rule of statutory construction, the State Board's broad authority to exercise discretion contained in 282.18(18) would prevail over section 282.18(3).

However, in matters of statutory construction, Iowa Code section 4.7 overrides Iowa Code section 4.8. Citizen's Aide/Ombudsman v. Miller, 543 N.W.2d 899, 903 (Iowa 1996). "[A]specific statute is not controlled or nullified by a general statute, and the more specific statute is given precedence over the more general one, regardless of priority of enactment, absent clear intention otherwise." Laird v. Ramirez, 884 F.Supp. 1265, 1275 (N.D.Iowa 1995).

Therefore, section 282.18(3), which specifically says that districts subject to desegregation plans may deny open enrollment if the transfer would negatively impact the desegregation plan, prevails in this case. The Des Moines District had the authority to deny open enrollment to these students, because their transfer out of the District would negatively impact the District's desegregation plan.

The District's Open Enrollment/Desegregation Policy No. 639 contains a hardship exception, which was discussed above in the Findings of Fact. It appears that Charles Ashley and Connor Gilligan may meet the hardship exception in the District's policy as testified to by Dr. Jeschke. The District did not have the information shown at the hearing to evaluate whether Charles and Connor meet the hardship exception at the time it evaluated their applications, because there is no space on the application form to give reasons for the request. The District must use application forms prepared by the State Department of Education. Iowa Code section 282.18(2)(1997). Those forms do not have space for a reason, because the legislature eliminated the requirement to state a reason in 1996. Compare Iowa Code 282.18(2)(1995) with 282.18(2)(1997). The reason this change was made is because in districts without a desegregation plan, the parent's reason for requesting open enrollment is irrelevant, and open enrollment must be granted by the sending district so long as the application is timely filed. In the case of a district such as Des Moines, which has a desegregation plan and a hardship exception, lack of space on the form means the District does not get the information it needs to evaluate whether a hardship exists. There are very few districts in Iowa which have a desegregation plan and a hardship exception. Therefore, it does not make sense, and would be confusing, to change the form. However, there is nothing in the statute which would prevent the Des Moines District from creating a supplemental form specifically designed to gather information relevant to the hardship exception which it needs to make the hardship determination.

Since the District never had the information, it never had the opportunity to evaluate Charles Ashley's and Connor Gilligan's cases to determine whether they met the hardship exception. Therefore, we recommend their cases be remanded to the District to determine whether they meet the hardship exception. We also recommend the District be asked to inform the State Board of its determination.

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Des Moines Independent Community School District made on January 21, 1997, which denied the Appellants' request for open enrollment for their children for the 1997-98 school

year, on the grounds the transfers would adversely impact the District's desegregation plan, is hereby recommended for affirmance, with the exception of **In re Charles Ashley** and **In re Connor Gilligan**, which are recommended for remand to the District for a determination of applicability of the hardship exception. The District is requested to inform the State Board of its determination. There are no costs of this appeal to be assigned.

_____ _____

DATE

AMY CHRISTENSEN, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

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_____ _____

DATE

CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION