**Iowa State Board
of Education
(Cite as 13 D.o.E. App. Dec. 133)**

In re Tayler Jo Alexi Kolbeck	:	
Jodie Wineski Appellant,	: :	
v.	:	DECISION
Des Moines Independent Community School District, Appellee	: : :	[Adm. Doc. #3719]

The above-captioned matter was heard telephonically on March 8, 1996, before a hearing panel comprising Ron Mells, consultant, Bureau of Special Education; Susan Fischer, consultant, Bureau of Practitioner Preparation and Licensure; and Ann Marie Brick, J.D., legal consultant and designated administrative law judge, presiding. The Appellant was "present" telephonically, unrepresented by counsel. The Appellee, Des Moines Independent Community School District [hereinafter "the District"], was also "present" telephonically in the person of Dr. Tom Jeschke, director of student services, also *pro se*.

A hearing was held pursuant to Departmental rules found at 281--Iowa Administrative Code 6. Appellant seeks reversal of a decision of the Board of Directors [hereinafter "the Board"] of the District made on December 12, 1995, which denied her application for open enrollment out of the district, beginning in the 1996-97 school year. Authority and jurisdiction for the appeal are found in Iowa Code §282.18(5)(1995).

I.
FINDINGS OF FACT

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

Appellant Jodie Wineski is the mother of two young children. Her daughter, Tayler Jo, is five years old and will attend kindergarten in the 1996-97 school year. Tayler has a younger brother, Drew Ryan, who was 18 months at the time this appeal was heard. Ms. Wineski and her husband are both employed full-time outside of the home. For the past two years, Tayler has been

cared for by a day care provider who is served by a school bus from the Urbandale District. The Wineskis would like to have their daughter attend in the Urbandale District so that she can be picked up and delivered to the same day care provider for before and after school day care.

To support their need for stability in Tayler's child care arrangements, Appellant testified that Tayler has been diagnosed with Attention Deficient Hyperactive Disorder.[1] According to a letter written by her doctor[2] for the hearing,

> Tayler has presented symptoms consistent with the following diagnoses: 1. ADHD-combined type; and 2. Oppositional Defiant Disorder. "It is my understanding Tayler Jo is in a day-care situation in Urbandale that is quite structured and very accepting of her behavioral difficulties. If Tayler Jo was allowed to be open-enrolled into the Urbandale school district for kindergarten, she could stay in her current day-care setting which has had a very positive influence in her life. Both of the parents work and transportation to the Urbandale school should be available right in front of the current day-care provider's home.[3] This arrangement would simplify the transitions in Tayler Jo's life, and hopefully help to stabilize her enough to be successful in the kindergarten setting."

(Letter date January 3, 1996, from Dr. Took.)

1Section 504 of the Rehabilitation Act of 1973 [§504] (29 USC §794(a) (West Supp. 1996) prohibits discrimination against covered individuals on the basis of their disability. The relevant part of §504 states:

> No otherwise qualified individual with a disability in the United States, as defined in §706(a) of this Title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id.

Several cases have held that a student who is diagnosed with Attention Deficient Hyperactivity Disorder [ADHD] or Oppositional Defiant Disorder, is disabled under the definition of §504. There is no evidence in the record that the Des Moines District is unable to provide transportation to and from the day care provider, or that the District's failure to provide this accommodation would constitute a violation of §504. However, the Appellant and District Administration should keep in close communication regarding Tayler Jo's needs to accommodate her adjustment to kindergarten. (For a case discussing the reasonable accommodation standard for a student with ADHD See Lyons by Alexander v. Smith, 829 F.Supp. 414 [85 Ed.Law Rep.] 803]](D.D.C. 1993).

2Dr. Kevin J. Took, M.D., child and adolescent psychiatrist medical director, Spectrum Mental Health Services, Iowa Methodist Medical Center, Des Moines, Iowa.

3Upon questioning, Ms. Wineski testified that the day-care provider is located on 63rd Street in Urbandale. She was then advised to contact Dr. Jeschke after the hearing to discuss the possibility that the Des Moines school bus could transport Tayler Jo to and from the day-care provider under the provisions of Iowa Code §285.1(22) which states in part, "[a] parent or guardian of an elementary pupil entitled to transportation pursuant to subsection 1 (pupil lives more than two miles from school of attendance), may request that a child day care facility be designated for purposes of subsection 9 rather than the residence of the pupil. ..."

Appellant's application for open enrollment was timely-filed under the law even though it was filed after the October 30th deadline for grades 1 through 12. Kindergarten students have an application deadline of June 30, 1996, when they are enrolling for kindergarten during the 1996-97 school year. See, 281--Iowa Administrative Code 17.7. The Appellant's application for open enrollment was not denied because it was late, nor because she did not have a good reason to seek attendance for her daughter in the Urbandale District. Her open enrollment application was denied under the District's open enrollment/desegregation policy.

The State Board of Education recently decided In re Mark Heirigs, *et al.*, 13 D.o.E. App. Dec. 112 (1996), which is the consolidated appeal of the parents who filed for open enrollment for their kindergarten students for the 1996-97 school year, but who filed prior to October 30, 1995. Even though her application was received after the October 30th date, Appellant's eligibility to leave the District was determined by the same process used in the earlier applications.

Dr. Jeschke testified regarding the process as follows:

> The District determines eligibility or ineligibility of each applicant for open enrollment on a case-by-case basis. Each child's racial status is verified; then the ratio of minorities to non-minorities at the child's attendance center is determined. It is then determined whether or not the child has siblings who have previously been approved for open enrollment.
>
> Appellant's daughter was among a group of non-minority students deemed ineligible for open enrollment because her transfer would adversely effect the District's existing minority/ non-minority ratio. The District's existing minority ratio is 1 minority student for every 3.15 non-minority students. This means that for every minority student who open enrolls out of the Des Moines District, roughly three non-minority students will be granted open enrollment.
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> Non-minority students wishing to open enroll out of the Des Moines District who have been deemed ineligible under the District's Desegregation Policy are placed on a waiting list by a computer randomization process. Since the deadline for open enrollment in grades 1 through 12 is October 30th, the kindergarten applications received by that date are included in the computer randomization process. However, kindergarten applications received between November 1st and June 30th are placed at the end of this list in the order they are received. If a minority student leaves the District under open enrollment, then the next 3 non-minority students at

the top of the list will be granted open enrollment for the 1996-97 school year. Under the District's open enrollment policy, nine schools are closed to open enrollment. In other words, these schools' minority ratios exceed 36% and the release of non-minority students from these schools would violate the District's desegregation policy. Appellant does not live in an attendance area which is closed to open enrollment.

Under the second portion of the District's open enrollment/desegregation policy which is involved here, 15 minority students were granted open enrollment for the 1996-97 school year. To preserve the existing minority/non-minority student ratio, 47 non-minority students were released for open enrollment under this portion of the policy.[4] However, there were 117 applicants for open enrollment as of the October 30th deadline. So, the next step involved a determination of who would be chosen to fill the 47 slots.

The District has a "sibling-preference" policy which gives priority to those student applicants who already have a brother or sister attending the receiving district under open enrollment. There were 20 students chosen under the sibling preference policy, which left 27 remaining slots for 97 open enrollment applicants. The 97 applicants were then placed on a waiting list by a computer-randomization process. As stated previously, Appellant was not part of this process since she had not applied by October 30th. Therefore, her daughter's name went on the waiting list in the order in which it was received among the group of kindergarten students who applied after November 1, 1995, but before June 30, 1996.

The District's practice of denying open enrollment applications under this "composite ratio" portion of its open enrollment/desegregation policy has been upheld by Judge Bergeson in his "Ruling on Petition for Judicial Review" filed June 1, 1995.

The decision to grant or deny this open enrollment application was made solely on the minority status of the pupil. The minority status of the pupil was ascertained from the application as completed by the parents. There was no effort to weigh the parents' reasons for seeking open enrollment. "Good cause" was not an issue in the Board's decision.

4This ratio is presently 1 minority for every 3.15 non-minority students (1:3.15 or 15 minority:47 non-minority students).

II.
CONCLUSIONS OF LAW

This case involves the delicate balance of two very important public policies: parental choice and effective desegregation of schools. In enacting Iowa's Open Enrollment Law, effective July 1, 1989, our Legislature codified its purpose:

> 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 §282.18(1)(1995).

A portion of the new law was directed specifically to the school districts under court-ordered or voluntary desegregation plans,[5] including the District here. That provision reads as follows:

> The board of directors of a school district subject to volunteer [sic] or court-ordered desegregation may vote not to participate in open enrollment under this section during the school year commencing July 1, 1990, and ending June 30, 1991. If a district chooses not to participate in open enrollment under this paragraph, the district shall develop a policy for implementation of open enrollment in the district for that following school year. 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 §282.18(14)(1993).

The law also presently includes a directive to those urban school districts regarding the maintenance of existing desegregation plans as they affect the racial composite:

[5] No school districts in Iowa are currently under court-ordered desegregation. Nine school districts are subject to an annual review and required to report to the State Board of Education due to race equity concerns. An additional three districts also report voluntarily.

> In all districts involved with voluntary or court-ordered desegregation, minority and non-minority 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 §282.18(4)(1995).

The role of the State Board of Education in appeals brought under Iowa Code §290, is to determine whether the local school board's decision comports with existing policy and law. More specifically, since the Board's policy has been judicially approved, the only question that remains is whether the District followed its own policy when it denied this open enrollment application.

In the appeal under consideration here, the only operative question is whether this is a "**non-minority**" student who is ineligible because her transfer would adversely affect the District's existing minority/non-minority ratio. (Bd. tr. at 54.) Once that has been determined, the controlling legal principles are applied to determine if the District's denial should be reversed or affirmed.

Although the hearing panel sympathizes with the Appellant's reasons for seeking open enrollment and her attempts to provide an educational environment which she feels is most supportive for her child's needs, the controlling legal principles for this open enrollment case have already been decided by the Polk County District Court in Des Moines Independent Community School District v. Iowa Department of Education, AA2432 (June 1, 1995). That case upheld the Des Moines District Board's right to deny timely-filed open enrollment applications that adversely affect the racial composite of the District. The only basis upon which the State Board of Education could overrule this open enrollment case is if the District's policy was not appropriately or correctly applied to the facts of an individual student's case. Finding no basis in law or fact to overturn the Appellant's case, the District's decision to deny her application for open enrollment is recommended for affirmance.

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

III.
DECISION

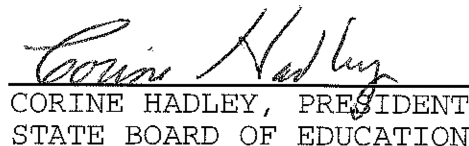
For the foregoing reasons, the decision of the Des Moines Independent Community School District's Board of Directors made on December 12, 1995, denying the open enrollment application of Appellant is hereby recommended for affirmance. There are no costs of this appeal to be assigned.

4/25/96
DATE

ANN MARIE BRICK, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

5/10/96
DATE


CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION