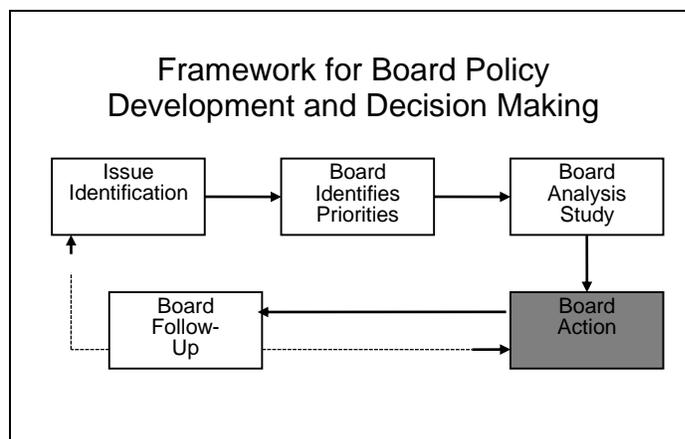


# Iowa State Board of Education

## Executive Summary

December 14, 2015



**Agenda Item:** *In re Expulsion of M.K. (West Des Moines Community School District)*

**Iowa Goal:** All PK-12 students will achieve at a high level.

**State Board Role/Authority:** Under Iowa Code section 290.1 the State Board of Education has authority to hear appeals from local school board decisions.

**Presenter:** Legal Counsel

**Attachments:** 3

**Recommendation:** It is recommended that the State Board consider and decide this matter.

**Background:** Attached is a decision reflecting a prior decision by the State Board to modify a proposed decision. On November 18, 2015, the State Board voted to modify the proposed decision to: (1) conclude it had jurisdiction of this matter; and (2) remand this matter to the local board for reconsideration of punishment.

Also attached is the application for rehearing filed by the WDMCSD and a resistance to that application filed by M.K.'s family.

M.K. was a freshman at Valley Southwoods which is in the West Des Moines Community School District (WDCSD) during the 2014-2015 school year. In April of 2015, M.K. was identified by several other students as an individual who was selling Adderall at school. One of the students provided an exchange of text messages between herself and M.K. where M.K. agreed to bring "addy" to the other student. M.K. admitted to sending the text messages, but indicated he only said this to be nice. After speaking with M.K. about the

accusations, administrators suspended M.K. for the remainder of the school year and brought before the WDCSD board for an expulsion hearing.

At the hearing, the board heard evidence, testimony, and the recommendation from the administration. The local board voted to suspend M.K for the remainder of the 2014-2015 school year, to expel M.K. for the first semester of the 2015-2016 school year, and to suspend him for the first quarter of the second semester of the 2015-2016 school year. Thereafter, M.K. was to be placed in an alternative educational setting.

M.K. and his parents appealed. The WDCSD Board filled a motion to dismiss the appeal alleging the appeal was improperly filed and the Appellants resisted. The Appellants filed a Motion for Summary Judgment and the Appellees filed a Cross-Motion for Summary Judgment. The Appellants moved to Strike the Appellees motion as untimely.

The State Board concludes any deficiencies in the affidavit of appeal do not provide it of jurisdiction, and conclude remand is appropriate given what appears to be an unduly harsh punishment, given M.K.'s fine academic record and non-existent disciplinary record.

The Administrative Law Judge's decision was modified accordingly.

The State Board will also discuss and rule on the application for rehearing filed by the WDMCSD and the resistance thereto.

**IOWA DEPARTMENT OF EDUCATION**

---

<i>In re Expulsion of M.K.</i>	)	
	)	
R.K.,	)	
	)	
Appellant,	)	DECISION
	)	
v.	)	
	)	
West Des Moines Community	)	Admin. Doc. No. 5015
School District,	)	
	)	
Appellee.	)	

---

This matter came before the Iowa State Board of Education (Board) at its regularly scheduled meeting on November 18, 2015. Appellant filed an appeal of the West Des Moines Board of Education decision and the State Board of Education reviewed that decision and the proposed decision of Administrative Law Judge Nicole Proesch. That proposed decision is attached hereto and incorporated by this reference.

After reviewing the briefs filed by counsel, having discussed this matter in open session, and being fully advised in the premises, a majority of the Board modifies the proposed decision as follows.

First, the motion to dismiss for lack of jurisdiction is overruled. The Board finds and concludes that under these unique circumstances, which Judge Proesch recited in her proposed decision, the Board has jurisdiction over this matter under Iowa Code section 290.1 (2015). Specifically, the Board believed the missing notarization of the Appellant's signature resulted in a clerical error, but did not result in a lack of jurisdiction. In all other forms the Appellant's Notice of Appeal was proper as to jurisdiction.

Second, we modify Judge Proesch's decision by expressly overruling Appellant's motion to strike Appellee's motion for summary judgment. The issue about whether to grant summary

judgment to either party is largely academic because, as the parties acknowledge, the facts are largely undisputed. Even if Appellee's motion for summary judgment is not timely, its resistance to R.K.'s motion for summary judgment was certainly timely and raised substantially the same issues and argument.

Third, we conclude substantial evidence supports the decision that M.K. violated the student code of conduct as alleged by the Appellee. This appeal is primarily a question of witness credibility. We leave in place the fact finder's (West Des Moines School Board and ALJ Proesch) establishment of credibility as it relates to all witnesses. For that reason, Appellant's motion for summary judgment in this respect is overruled.

Fourth, we conclude that the Appellee's decision must be remanded. We conclude that Appellant's motion for summary judgment must be granted insofar as it concerns M.K.'s suspension for the first quarter of the second semester of the 2015-2016 school year and placement thereafter in an alternative educational setting. Judge Proesch's decision is so modified.

Our review is for abuse of discretion, *Sioux City Comm. Sch. Dist. v. Iowa Dep't of Educ.*, 659 N.W.2d 563, 569 (Iowa 2003), and we find and conclude Appellee over extended its discretion when it provided no option for a freshman in high school with an outstanding academic record and no prior disciplinary record to not be able to return to a regular, general population educational environment ever. We are concerned that the Appellee gave insufficient weight to M.K.'s fine academic record and non-existent disciplinary record. We have grave concerns that M.K. will be harmed by what appears to us to be unreasonably harsh discipline. Therefore, we remand this matter to the Appellee's board of directors to reconsider the discipline imposed commencing the first quarter of the second semester of the 2015-2016 school year. We direct Appellee's board to fully consider and weigh the various aggravating and mitigating factors in this case, including but not limited to M.K.'s academic and disciplinary record.

## DECISION

For the forgoing reasons, Judge Proesch's proposed decision is MODIFIED IN PART.

Appellant's Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART. We remand this matter to the West Des Moines Community School District's board of directors for reconsideration of all punishment that would be imposed after the conclusion of the first semester of the 2015-2016 school year, said reconsideration to be consistent with this decision. The District's board shall act on remand within fourteen (14) days of the date of this Decision.

All other motions currently pending are moot and are therefore DENIED.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Charles C. Edwards Jr., Board President  
State Board of Education

IOWA DEPARTMENT OF EDUCATION

---

<i>In re Expulsion of M.K.</i>	)	
	)	
R.K.,	)	
	)	
Appellant,	)	PROPOSED DECISION
	)	
v.	)	
	)	
West Des Moines Community	)	Admin. Doc. No. 5015
School District,	)	
	)	
Appellee.	)	

---

On June 26, 2015, the Appellants filed an the appeal of the West Des Moines Community School District (“WDCSD” or “District”) Board of Directors’ (“WDCSD Board” or “Board”) decision rendered on May 27, 2015, to suspend M.K for the remainder of the 2014-2015 school year, to expel M.K. for the first semester of the 2015-2016 school year, and to suspend him for the first quarter of the second semester of the 2015-2016 school year. Thereafter M.K. was to be placed in an alternative educational setting.

Appellee filed a Motion to Dismiss on July 7, 2015. Appellant’s filed a Resistance to the Motion to Dismiss on July 17, 2015 and Appellee filed a reply on July 22, 2015. Appellants also filed a Motion for Summary Judgment on August 7, 2015. On August 24, 2015, the Appellee’s filed a Resistance to the Motion for Summary Judgment and a Cross-Motion for Summary Judgment. Appellants filed a Motion to Strike Appellee’s Untimely Cross Motion for Summary Judgement on September 3, 2015. After reviewing the parties’ motions the undersigned makes the following findings and conclusions.

**MOTION TO DISMISS**

It is clear under Iowa Code section 290.1, that an appeal “shall be an affidavit filed with the State Board by the party aggrieved within the time for taking the appeal.” Iowa Code § 290.1; *see also* 281 IAC § 6.1(1). “An affidavit is a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state.” Iowa Code § 622.85. The Appellees argue in the Motion to Dismiss that the appeal letter is not an “affidavit” as required under Iowa Code section 290.1 because it was not notarized and did not contain any other indication that the declarations of the Appellant were sworn to and made under oath. The letter of appeal contains the signature of the Appellant and his Attorney, who is a notary, but it is void of a notary stamp or a statement that the appeal was

made under oath. *See* Iowa Code § 622.1 (allowing certification under the penalty of perjury). While we recognize that the appeal letter contains a footnote that states “this letter and its attachments are referred in this document as the appeal of [M.K.], but despite the nomenclature attached hereto, should be construed as M.K.’s ‘Affidavit’ needed to appeal the Board’s decision as required by Iowa Code § 290.1,” this statement does not make the letter an affidavit for purposes of the State Board’s jurisdiction over the appeal. The State Board has found that lack of compliance with statutory requirements will result in no jurisdiction. *In re Intra District Transfers*, 27 D.o.E. App. Dec. 568 (2015).

Additionally, the Appellant cannot cure this defect by attempting to file an affidavit after the time for filing the appeal has run. 281 --- Iowa Administrative Code rule 6.3(6) only allows a substantive amendment to an affidavit already on file, it does not allow for an extension of the filing deadline. As such, the State Board lacks jurisdiction to hear the appeal.

However, given that this is a very time sensitive issue involving a student’s suspension and expulsion we will review the merits of the parties’ motions for Summary Judgment below and attempt to resolve those issues for purposes of further review. Even if we broadly construe the letter of appeal as a properly filed affidavit, we find that the Appellants would not be entitled to relief for the reasons stated below.

## **MOTION FOR SUMMARY JUDGMENT**

### **A. Undisputed Facts**

The pleadings and exhibits reveal the following undisputed facts:

M.K. was a fifteen year old freshman at Valley Southwoods (“Valley”) during the 2014-2015 school year. M.K. has a diagnosis of ADHD and as a result is prescribed to take Adderall. Despite this diagnosis M.K. has a 3.69 GPA. On April 30, 2015, Valley Administration was contacted by a concerned parent and informed that several Valley students were selling or using Adderall. During an investigation into the allegations Student A and Student D identified M.K. as a person that was selling or possessed Adderall. Administration interviewed M.K. regarding the allegations, which M.K. denied. A search of M.K. and M.K.’s locker found nothing.

On May 8, 2015, Student B submitted a revised statement to administration identifying M.K. as a person Student B purchased Adderall from. In Student B’s initial interview she had not identified M.K. as the source of Adderall because she did not want to get a friend in trouble. In the revised statement Student B admitted to purchasing the Adderall from M.K. for her own use and not for redistribution to another student, thereby eliminating her risk of expulsion for distribution. On May 12, 2015, administration was provided screen shots from Student B’s cell

phone showing the following conversation with Student B and M.K. between April 25, 2015 and April 28, 2015:

*Sunday, April 25, 2015*

Student B: can u bring me addy tomorrow :-).

M.K.: Sorry I'm all out rn. I'm buying some more soon though

Student B: [expletive deleted] me ok  
thx tho

M.K.: Lol, I'll have some more Wednesday

Student B: ok ok

*Tuesday, April 28, 2015*

Student B: can you bring me some tomorrow :-)

M.K.: How much

Student B: can u bring me 2 20s and a 30 me for 7\$

M.K.: Ya

On May 15, 2015, Valley administration interviewed M.K. regarding the allegations. M.K. requested the presence of his father and the interview was stopped. The parties both agree the interview did not continue after M.K.'s father arrived but they dispute who stopped the interview from continuing. M.K. was immediately suspended for the remainder of the 2014-2015 school year. On May 22, 2015, Valley provided written notice to M.K. that it was seeking a one semester expulsion for M.K. and referred the matter to the West Des Moines School District Board.

A hearing was held on May 27, 2015. At the hearing Valley administration a packet to the Board which contained the written statements of the Students A, D, and B, and screenshots from Student B's phone with the text messages. No oral testimony of the Students was presented. Student B's mother testified as did administration. There was testimony presented regarding the color of the pills Student B received and whether or not it matched the color Adderall comes in. Despite Student B's statement and the text messages, M.K. admitted he sent the text messages but stated that he never delivered Adderall to Student B. M.K. claimed he was just being nice to a friend by saying he would help her out. M.K. testified that he did not possess or sell a controlled substance, except for properly consuming a prescription in the nurse's office. The WDCSD Board found M.K. violated board policies 503.1, 502.7B and 502.8, for possessing and distributing a controlled substance at Valley.

Board policy 503.1 prohibits the:

Possession of a controlled substance or a controlled substance lookalike . . . While on school premises, while on school owned and or operated school or chartered buses,

while attending or engaged in school sponsored activities, while away from school grounds if misconduct will directly affect the good order, efficiency, management and welfare of the school.

Board policy 502.7B 1 provides that a student may be discipline for:

Possessing, using or being under the influence of any controlled substance . . . and manufacturing, possessing, or selling drug paraphernalia are strictly prohibited while a student is on any school property or under school supervision.<sup>1</sup>

Board Policy 502.8 provides that:

[S]ale or distribution, attempted sale or distribution and or purchase or acquisition with the intent to sell or distribute by a student of any prohibited substance.... Is strictly prohibited while the student is on any school property or under school supervision. This includes attendance at school or a school sponsored event.

After considering the evidence, testimony, and arguments of the parties the WDCSD Board found M.K. violated the above board policies and voted to suspend M.K for the remainder of the 2014-2015 school year, to expel M.K. for the first semester of the 2015-2016 school year, and to suspend him for the first quarter of the second semester of the 2015-2016 school year. Thereafter M.K. was to be placed in an alternative educational setting. In the Board's written decision the Board noted:

[M.K.] has denied the allegations that he possessed or sold a controlled substance except by properly consuming his medication either at home or at the school nurses office. However, the text messages, taken in conjunction with the statements of the students, indicate intent to distribute and actual distribution of a prohibited substance. The standard in a discipline case is a preponderance of the evidence, not proof beyond a reasonable doubt. [M.K.'s] explanation of the text messages was not credible, and the statements of the three others are persuasive. Student A's reports regarding other students have proved accurate to the degree that others she has named have admitted to their participation in the conduct.

The Appellants filed a timely notice of appeal.

---

<sup>1</sup> An exception to this policy is possession of a medication prescribed by the individual student's licensed health care provider and which is taken in accordance with the licensed health care provider instructions.

## B. Conclusions of Law

Both parties have submitted Motions for Summary Judgment. Summary Judgment is appropriate if in viewing the evidence in the light most favorable to the nonmoving party, “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Iowa R. Civ. Pro 1.981(3); *Weddum v. Davenport Comm. Sch. Dist.*, 750 N.W.2d 114, 117 (Iowa 2008). For summary judgment purposes an issue of fact is material only if the dispute is over facts that might affect the outcome. *Weddum*, 750 N.W.2d at 117 (internal citations omitted). “When the only controversy concerns the legal consequences flowing from undisputed facts, summary judgment is the proper remedy.” *Id.* In the present case the parties do not dispute the facts. The issue is whether or not the Appellants or the Appellees are entitled to judgment as a matter of law.

The review of a local school board’s decision is for abuse of discretion. *See Sioux City Comm. Sch. Dist. v. Iowa Dep’t of Educ.*, 659 N.W.2d 563, 569 (Iowa 2003). In applying abuse of discretion we look at whether a reasonable person could have found sufficient evidence to come to the same conclusion. *Id.* “[W]e will find a decision was unreasonable if it was not based on substantial evidence or was based upon an erroneous application of the law.” [Citations Omitted] *Id.* at 569. The State Board will not disturb a local decisions in school discipline issues unless they are “unreasonable and contrary to the best interest of education.” *In re Jesse Bachmann*, 13 D.o.E. App. Dec. 363, 369 (1996). The decision of a local board to suspend or expel a student is clearly an issue of discretion. The question here is whether or not the decision of the WDCSD Board to suspend and expel M.K. was reasonable under the facts and circumstances. If the decision was reasonable we must find in favor of the local board as a matter of law. If not we must find in favor of the Appellants.

The Iowa Legislature has conferred broad authority to local school boards to adopt and enforce its own rules and disciplinary policies. *See* Iowa Code §§ 279.8 & 282.4. Under section 279.8, “the board shall make rules for its own government and that of the . . . pupils, and for the care of the school house, grounds, and property of the school corporation, and shall aid in enforcement of the rules.” Local school boards have the explicit statutory authority to expel or suspend students for violating school rules pursuant to Iowa Code section 282.4. Additionally, under Iowa Code section 279.9 a board “shall prohibit . . . the use or possession of . . . any controlled substance . . . by any student of the schools and the board may suspend or expel a student for a violation of this rule under this section.” Iowa Code § 279.9. Thus, school districts have broad discretion to punish students who break the rules as long as the district follows appropriate due process requirements. *In re Suspension of A.W.*, 27 D.o.E. App. Dec. 587 (2015).

The Appellants argue there was not substantial evidence to support a finding that M.K. violated board policies. Specifically, they argue there was no evidence this violation occurred

on school grounds. However, Board Policy 503.1 provides that it is also a violation to possess a controlled substance “while away from school grounds if misconduct will directly affect the good order, efficiency, management and welfare of the school.” Under the circumstances here three students came forward and identified M.K. as an individual who sells Adderall. These students all attend Valley. Thus, it is a reasonable interpretation of the rule that this type of behavior directly affected the good order and welfare of the school. Additionally, there was no evidence presented that the transactions did not occur on school grounds. One could infer from the text messages that were sent on a Tuesday night, a school night, from M.K. to Student B that M.K. planned to provide the Adderall the next day at school. Additionally, several of the witness statements indicated that some of the drug transactions occurred at school or afterschool, although M.K. was not specifically indicated in those transactions. “An inference of knowledge and intent can be drawn from the circumstances.” *In re Amy Cline*, 2 D.P.I. App. Dec. 16, 19 (1979).

The WDCSD Board found by a preponderance of the evidence that M.K. violated the board’s policies. “A ‘preponderance of the evidence’ exists when there is enough evidence to ‘tip the scales of justice one way or the other’ or enough evidence is presented to outweigh the evidence on the other side.” *In re Shinn*, 14 D.o.E. App. Dec. 185 (1996). Specifically, the WDCSD Board noted in its findings that it did not find M.K.’s testimony at the hearing to be credible given the other evidence from other students and the text messages from M.K.’s phone. We will not substitute our judgment regarding witness credibility for that of the local board. It is the factfinder’s duty to weigh credibility. *See Iowa Supreme Court Attorney Disciplinary Board v. Weaver*, 750 N.W.2d 71 (Iowa 2008). “It is entirely reasonable to give credibility to the students who admitted their own guilt and implicated the Perrys... .” *In re Perry*, 22 D.o.E. App. Dec. 175, 181 (2003). Even if Student B was not forthcoming in her first statement to administration, the text messages given to administration provided support to the truth of her amended statement. Based on the evidence presented at the hearing we find the Board’s determination that M.K. violated board policies was reasonable.

We now review the imposition of discipline for reasonableness. The State Board has found that imposing an expulsion for possession and/or distribution of drugs is reasonable and not contrary to the best interest of education. *See In re Colton L.*, 24 D.o.E. App. Dec. 177 (2007); *see also In re Hodges*, 22 D.o.E. App. Dec. 279 (2004). In fact, Iowa Code section 279.9 provides that it is a permissible punishment. *See Iowa Code § 279.9*. Thus, we also find that the sanction imposed on M.K. in this case was reasonable under the circumstances and not contrary to the best interest of education. Although the Appellants also argue that M.K. was denied due process, we find no evidence that M.K. was denied due process.

The record conclusively establishes that the WDCSD Board’s decision was within the zone of reasonableness. Thus, in viewing the evidence in the light most favorable to the

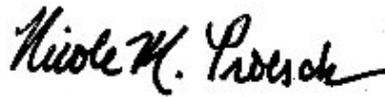
Appellants the pleadings and exhibits offered in this case show that there is no genuine issue as to any material fact and that the Appellees are entitled to judgment as a matter of law.

**DECISION**

For the forgoing reasons, the Appellee's Motion to Dismiss is GRANTED, the Appellant's Motion for Summary Judgment is DENIED, and the Appellee's Motion for Summary Judgment is GRANTED in favor of the West Des Moines Community School District Board. All other motions currently pending are moot and are therefore DENIED.

9/4/2015

Date



\_\_\_\_\_  
Nicole M. Proesch, J.D.

Administrative Law Judge

\_\_\_\_\_  
Date

\_\_\_\_\_  
Charles C. Edwards Jr., Board President  
State Board of Education

RECEIVED

NOV 25 2015

DEPARTMENT OF  
EDUCATION

BEFORE THE STATE BOARD OF THE  
IOWA DEPARTMENT OF EDUCATION

*In re Expulsion of M.K.*

R.K.,  
Appellant,

v.

WEST DES MOINES  
COMMUNITY SCHOOL DISTRICT,  
Appellee.

Admin. Doc. No. 5015

APPLICATION FOR  
REHEARING/  
MOTION FOR  
RECONSIDERATION OF  
STATE BOARD ACTION

COMES NOW Appellee West Des Moines Community School District (the "School District"), pursuant to 281 Iowa Administrative Code Section 6.20 and Iowa Rule of Civil Procedure 1.904, and submits this application for rehearing and motion for reconsideration of the action taken by the State Board of the Iowa Department of Education ("State Board") on November 18, 2015, in the above-referenced case. Rehearing/reconsideration is necessary to correct mistakes of law or fact. 281 Iowa Admin. Code § 6.20; Iowa R. Civ. P. 1.904.

I. THE STATE BOARD ERRED IN ASSUMING JURISDICTION OF THIS CASE

The State Board acknowledged the requirement of an affidavit for initiating an appeal under Iowa Code Section 290.1. The State Board also recognized the Appellant did not file an affidavit. Yet, the State Board still acted to assume jurisdiction of this case. This was a fundamental legal error.

A. The State Board Does Not Have Authority to Waive the Requirement for an Affidavit

The requirement for an affidavit was set by the Iowa Legislature in Section 290.1. The statute expressly states that “the basis of the proceedings shall be an affidavit filed with the state board.”

It is apparent some members of the State Board do not agree with the requirement for an affidavit. However, such opinions are irrelevant for purposes of this case. The plain terms of the statute require an affidavit in order to initiate an appeal. The Iowa Legislature – not the State Board, not the School District, and not the Appellant – set this requirement by statute.

The State Board may not waive the statutory requirement for an affidavit, just as it may not pick and choose which other statutory requirements it wants to enforce. **The State Board does not have any legal authority to waive or allow variances from statutory requirements.** The State Board’s own administrative rules even acknowledge as much. *See* 281 Iowa Admin. Code § 4.3 (“Statutory duties or requirements created by statute may not be waived.”).

The issue presented has already been considered by the Polk County District Court, *Rosa v. West Des Moines Community School District*, Case No. CV 6862 (Polk County, Iowa 2008). Unfortunately, it seems some State Board members are unfamiliar with this case, despite a copy of it being provided to the State Board by the School District.

In *Rosa*, the District Court upheld the administrative law judge’s dismissal of an appeal to the State Board because the appeal did not constitute an affidavit as required by statute. The Court aptly stated, “The courts and agencies are bound by statutory requirements, and special exceptions cannot be made.” The Court found there is no legal authority to excuse a failure to comply with the statutory requirements for initiating an appeal.

The same holds true for this appeal. The *Rosa* case is directly on point, and the statutory interpretation applied there is equally applicable here. The decision in *Rosa* is binding legal precedent for the State Board. However, the action taken by the State Board to waive the requirement for an affidavit is directly contrary to the Court's decision in *Rosa*.

B. Without the Required Affidavit, the State Board Does Not Have Jurisdiction

The State Board is an administrative agency. It only has such jurisdiction as conferred on it by statute in Section 290.1.

It is well established the affidavit is “[t]he basis of the appeal” and is how the State Board “obtain[s] jurisdiction” under Section 290.1. *Sanderson v. Board of School Directors of Lincoln Twp., Winneshiek County*, 234 N.W. 216, 218-19 (Iowa 1931). The State Board has also held in numerous cases that compliance with Section 290.1 is necessary for it to acquire jurisdiction over an appeal made pursuant to the statute. *See, e.g., In re Edward Zaccaro, et al.*, 13 D.o.E. App. Dec. 126, 128-29 (April 1996). It is crystal clear that an affidavit is a prerequisite for the State Board to have any authority over the appeal. **Without the required affidavit, the State Board does not have any jurisdiction to act.**

It was suggested by a State Board member that the Appellant overlooked the requirement for an affidavit. This is not only irrelevant, it is also incorrect. The Appellant admittedly knew Section 290.1 required an affidavit – he just chose not to comply with the requirement. This is evidenced by a footnote in the letter submitted by the Appellant, directing the State Board to “construe” the letter as an affidavit, and conceding an affidavit is “needed to appeal the . . . decision as required by Iowa Code Section 290.1.”

Calling something a spade does not make it a spade. The notion that the Appellant can sidestep a basic requirement for effectuating an appeal is nonsensical. The State Board may not minimize the express requirement of an affidavit in Section 290.1, any more than it may accept a late-filed appeal. The authority of the State Board is limited to the parameters set by the Iowa Legislature in Section 290.1.

## II. THE STATE BOARD ERRED IN REMANDING THIS CASE FOR RECONSIDERATION OF THE DISCIPLINE IMPOSED

The State Board agreed there is sufficient evidence of misconduct by M.K. The State Board also acknowledged the discipline imposed by the School District on M.K. for the misconduct need only be reasonable. Yet, the State Board still acted to remand this case to the local board at the School District to reconsider the discipline imposed. This was, again, a fundamental legal error.

### A. The School District Has the Legal Authority to Impose Discipline

Local school districts are vested with the power and responsibility for imposing student discipline. This authority is derived from the Iowa Legislature, in the following statutes:

- Iowa Code Section 279.8 (stating that the board “shall make rules for its own government and that of the . . . pupils, . . . and shall aid in enforcement of the rules . . .”);
- Iowa Code Section 282.4 (stating that the board “may, by a majority vote, expel any student from school for a violation of the regulations or rules established by the board, or when the presence of the student is detrimental to the best interests of the school,” and may “confer upon any teacher, principal, or superintendent the power temporarily to suspend a student, notice of the suspension being at once given in writing to the president of the board”); and
- Iowa Code Section 279.9 (stating that the board’s rules “shall prohibit . . . the use or possession of . . . any controlled substance . . . by any student of the schools and the board may suspend or expel a student for a violation of a rule under this section”).

School districts have broad discretion to discipline students who break their rules. *In re: Suspension of A.W.*, 27 D.o.E. App. Dec. 587 (March 26, 2015).

Pursuant to this legal authority, the School District has policies in place regarding student conduct and discipline, including the following policies pertinent to this appeal:

- Policy 503.1 (providing for temporary suspension up to ten school days of a student who possesses a controlled substance);
- Board Policy 502,7B (specifying a student who possesses a controlled substance for the first time is recommended for removal from school and placed in an alternate setting for 45 school days); and
- Board Policy 502.8 (specifying a student who distributes any prohibited substance is placed on an out-of-school suspension and recommended for expulsion to the local board).

Following the hearing in this case, the local board determined M.K. distributed prescription Adderall pills to other students in the School District in violation of its policies. The local board then took action to impose discipline on M.K. for his misconduct:

Pursuant to Board Policies 502.7B and 502.8 [M.K.] is subject to a long term suspension and participation in an alternate setting for 45 days for possession, and expulsion for distribution or intent to distribute. The administration recommends expulsion for the entire 2015-2016 school year. The Board concludes that he should be suspended for the remainder of the 2014-2015 school year to obtain credit for the current semester's work, which the administration agrees is proper. He should then be expelled for the first semester of the 2015-2016 school year. He then should be suspended for the first quarter of the second semester and placed in an alternate educational setting. Thereafter he may be readmitted to the regular program.

The local board set forth the disciplinary action and supporting rationale in a written decision. Unfortunately, it seems some Board members are not clear on the discipline imposed, despite it being part of the record in this case.

Essentially, the School District suspended M.K. for a few days at the end of the 2014-2015 school year, expelled M.K. for the first semester of the 2015-2016 school year, and

suspended M.K. for the first quarter of the second semester with placement in an alternate educational setting. **The discipline imposed by the School District is, indisputably, in accordance with its legal authority and the consequences stated in its policies.** It represents a logical application of the differing levels of sanctions available to the local board. It surely does not deviate so far from reason so as to amount to an abuse of the local board's discretion in this area.

**B. The State Board Is Not a Super School Board**

It is a longstanding principle that the State Board does not act as a "super school board," substituting its own judgment for that of the local school board. *Cf. In re Jerry Eaton*, 7 D.o.E. App. Dec. 137 (1987). Alas, that is precisely the role the State Board played in this case.

It is apparent some members of the State Board do not like the level of discipline imposed on M.K. for distributing prescription Adderall pills to other students in the School District. However, those members are mischaracterizing the weight of their opinions with regard to student discipline. **The decision as to the appropriate level of student discipline properly rests with the local board, which is in the best position to evaluate the competing interests at stake. It is not the State Board's decision to make.**

It is difficult to envision a more obvious case of the State Board acting as a super school board and substituting its judgment, than in the instant appeal. Without ever holding an evidentiary hearing, the State Board proceeded to deliberate on the merits of M.K.'s discipline. The discussion among the members of the State Board ranged from remarks about student uses for prescription Adderall pills, to giving preference to M.K.'s grades and disciplinary history over his misconduct, to mulling the involvement of law enforcement.

There was even some discussion suggesting that alternative placement would not be suitable for M.K. Not only is this improper speculation, but it disregards the statutory authority of the School District to place students in its schools. See Iowa Code § 279.11 (“The board of directors shall . . . determine the particular school which each child shall attend . . .”). The State Board itself has recognized that students who choose to engage in misconduct may find themselves in educational placements they do not prefer. *In re: Suspension of A.W.*, 27 D.o.E. App. Dec. 587 (March 26, 2015) (“While we understand that this is not the preferred educational placement for A.W., we also understand that A.W.’s conduct was not the preferred conduct that WDCSD expects of its students. As such, the decision of the WDCSD Board was reasonable.”).

At any rate, all of the factors considered by the State Board were part of the record at the local level. That is, the local board has already received and reviewed the information presented at the hearing and reached a reasonable decision. To remand the issue of discipline back to the local board wholly ignores, and is directly contrary to, the discretionary authority vested to the local board. It fails to appreciate the critical distinction between the State Board and local boards.

It should be noted that a highly appropriate function of public school education is to prohibit and discipline inappropriate student conduct. Indeed, “schools must teach by example the shared values of a civilized social order.” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). The situation that led to M.K.’s discipline jeopardized the health and safety of other students. Such misconduct warranted serious corrective action. The discipline imposed on M.K. serves as a lesson to him and other students about the major consequences of selling controlled substances in the School District.

III. CONCLUSION

In light of the foregoing, the action taken by the State Board in this case constitutes grounds for reversal by the Polk County District Court upon a petition for judicial review. See Iowa Code § 17A.19(10). Therefore, it is now necessary to correct the mistakes of law or fact.

Accordingly, the School District respectfully requests rehearing of the action taken by the State Board, pursuant to 281 Iowa Administrative Code Section 6.20(1). In the event rehearing is granted, the School District requests the proposed decision of the administrative law judge be affirmed, pursuant to 281 Iowa Administrative Code Section 6.20(2).

Additionally, the School District respectfully requests enlargement and/or amendment of the factual findings and legal conclusions made by the State Board on all issues raised in taking its action, and modification and/or substitution of the action in accordance therewith, pursuant to Iowa Court Rule 1.904(2).

/s/ Kristy M. Latta

Kristy M. Latta (AT0004519)  
AHLERS & COONEY, P.C.  
100 Court Avenue, Suite 600  
Des Moines, Iowa 50309-2231  
Telephone: 515/243-7611  
Facsimile: 515/243-2149  
E-mail: [klatta@ahlerslaw.com](mailto:klatta@ahlerslaw.com)  
ATTORNEY FOR APPELLEE

Original filed.

Copy to:

David E. Brick  
Brick Gentry, P.C.  
6701 Westown Parkway, Suite 100  
West Des Moines, Iowa 50266  
ATTORNEY FOR APPELLANT

01186871-1W1332-121W

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on

November 25, 2015

- By  U.S. Mail  Fax
- Hand Delivery  Private Carrier
- Electronically through CM-ECF

Signature /s/ Kristy M. Latta

RECEIVED

DEC 04 2015

DEPARTMENT OF  
EDUCATION

*MP*  
12/4/15

BEFORE THE STATE BOARD OF THE  
IOWA DEPARTMENT OF EDUCATION

<p>In re Expulsion of M.K.,  R.K.,  Appellant,  vs.  WEST DES MOINES COMMUNITY SCHOOL DISTRICT,  Appellee.</p>	<p>Admin. Doc. No. #5015   AMENDED MOTION TO STRIKE/DISMISS APPELLEE'S APPLICATION FOR REHEARING/MOTION FOR RECONSIDERATION</p>
--	---

COMES NOW Appellant, R.K. and for his Motion to Strike/Dismiss Appellee's Application for Rehearing/Motion for Reconsideration states as follows:

1. On November 18, 2015 the State Board of the Iowa Department of Education voted that the Appellant's appeal of the expulsion of M.K. should not be dismissed for lack of jurisdiction and also voted that the case should be remanded back to the West Des Moines School Board for reconsideration regarding the disciplinary decision handed down by the West Des Moines School Board on June 9, 2015. The State Board of the Iowa Department of Education at the November 18 hearing, stated that this reconsideration should be considered by the West Des Moines School Board prior to the end of calendar year 2015 at a regularly scheduled board meeting or to hold a special board meeting on or before December 31, 2015 in order to accommodate this decision. Finally, the State Board very clearly indicated that a final written decision would be provided consistent with said oral findings of the State Board.

2. To-date, the State Board's final written decision has not yet been filed or entered.

3. The West Des Moines School Board had a Board of Directors meeting on November 23, 2015 which was five days after the Appeal Hearing with the State Board of Education. The State Board of Education oral findings were not shared or discussed with the West Des Moines School Board.

4. Despite the West Des Moines Community School Board not being informed of the oral findings of the State Board at their November 23, 2015 meeting, the School District now apparently seeks to have the “final decision” of the State Board reheard and reconsidered pursuant to 281 Iowa Admin. Code § 6.20 and Iowa Rule of Civil Procedure 1.904 as indicated by their Application/Motion filed on November 25, 2015.

5. The decision to file the Application For Rehearing/Motion For Reconsideration was not made with any input from the West Des Moines School Board and was done solely at the direction of the school administration.

6. As no final written decision has been filed or entered by the State Board, Appellee’s Motion is premature, untimely, not appropriate to be filed and clearly not allowed under 281 Iowa Admin. Code § 6.20 and Iowa Rule of Civil Procedure 1.904.

7. 281 Iowa Admin. Code § 6.20 provides:

Application for rehearing of final decision. Any party may file an application for rehearing with the presiding officer stating the specific grounds therefore, and the relief sought, within 20 days **after the issuance of any final decision** by the board. A copy of the application shall be timely mailed by the department to all parties of record not joining therein. Such application for rehearing shall be deemed to have been denied unless the board or the presiding officer grants the application within 20 days of filing. A rehearing shall not be granted unless it is necessary to correct a mistake of law or fact, or for other good cause. 281 Iowa Admin. Code § 6.20 (2015) (emphasis added).

8. Iowa Rule of Civil Procedure 1.904 provides:

1.904(1) The court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, **shall find the facts in writing, separately stating its conclusions of law**, and direct an appropriate judgment. No request for findings is necessary for purposes of review. Findings of a master shall be deemed those of the court to the extent it adopts them.

1.904(2) On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise. Resistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431(5).

Iowa R. Civ. Pro. 1.904 (2015) (emphasis added).

9. A final order or judgment is “one that puts the case out of the court and which may be enforced by execution or in some other appropriate manner.” In re Interest of Long, 313 N.W.2d 473, 476 (Iowa 1981). Further, a ruling is not final when the court expresses its intent to do something further to signify a final adjudication. Id. “When a ruling specifically provides for subsequent entry of a final order, the ruling itself is not a final judgment or decision. Id. (citing Flynn v. Lucas Cty Mem’l Hosp., 203 N.W.2d 613, 614-15 (Iowa 1973) and Crowe v. DeSoto Consolidate Sch. Dist., 66 N.W.2d 859, 560 (1954)).

10. In the instant matter, the State Board’s oral findings/ruling is not a final judgment subject to a motion for rehearing. The State Board specifically stated that a written decision/judgment would be entered following the November 18, 2015 hearing. Such written decision will constitute a final judgment subject to an application for rehearing/motion to reconsider. *281 Iowa Admin. Code § 6.2 (256,290, 17A) Definitions lists the word “ISSUANCE” to mean the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.*

11. Simply put, the Appellee filed their Application/Motion prior to the issuance of a final judgment being rendered in an apparent attempt to communicate, cause concern, provide inaccurate information and sway the decision of the State Board of Education before the issuance of their final decision, which is not allowed under 281 Iowa Admin. Code § 6.20 or Iowa Rule of Civil Procedure 1.904. Appellant can only assume that Appellee has done this in an attempt to circumvent the State Board entering a written decision that would become public record, continue to delay these proceedings to avoid a reconsideration hearing for M.K. prior to the start of the next semester, and continue to cost the Appellant more money in order to fight the West Des Moines School Board June 9, 2015 disciplinary decision.

12. Appellee counsel continues to provide inaccurate statements of fact in her briefs. The State Board never agreed there is sufficient evidence of misconduct by M.K. in this case. The State Board was silent regarding this issue and did not address this or the violations of M.K. due process rights. The Appellant still contends that the due process rights of M.K. were violated in this case. A clearly established principle absent here is the requirement that a due process hearing must precede a decision to administer discipline in instances of suspension and most likely expulsion. *Goss v Lopez*, 419 U.S. 656, 95 S.Ct 729 (1975). Students and their parents must be given sufficient notices of the charges against the students with sufficient time to prepare an appropriate defense. In this case the appellant was only afforded two days to prepare for this case, never told they could provide witnesses on M.K.'s behalf and the administration changed the discipline period that was provided in the notice of one semester to a year after the hearing was completed. Much less there is no way that a reasonable person with the statements and testimony provided by a "preponderance of the evidence" can come to the conclusion that M.K. violated any school policy while at school, on school grounds or at a school function.

13. The State Board acts as policymaker and advisor when it fulfills the duties mandated by sections 256.7(5) and 256.7(6). These are the duties of rulemaking and hearing appeals under Chapter 290, respectively. The Standard of Review governs what the State Board is required to do when it hears appeals. The Legislature tells us how that Review process should occur:

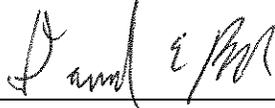
At the time for hearing, it [the State Board] shall hear testimony for either party...and it shall make such decision as may be *just and equitable*. The State Board has been directed by the Legislature to render a decision that is "just and equitable" [section 290.3], "in the best interest of the affected child(ren) [section 282.18(20)] and "in the best interest of education" [section 281 IAC 6.11(2)].

That is exactly what the State Board did by coming to the decisions they concluded in this Appeal.

14. For the reasons set forth above, Appellant respectfully requests the State Board dismiss or strike Appellee's Application/Motion and direct that such Application/Motion cannot be filed until after the written decision of the State Board has been filed/entered. Should the State Board deem the Application/Motion properly filed, Appellant requests additional time to provide a Resistance to the merits of such Application/Motion, that the matter be placed on agenda for State Board of Education's December meeting, and that the parties be allowed time for oral argument.

WHEREFORE Appellant respectfully requests the State Board dismiss or strike Appellee's Application/Motion and direct that such Application/Motion cannot be filed until after the written decision of the State Board has been filed/entered. Should the State Board deem the Application/Motion properly filed, Appellant requests additional time to provide a Resistance to the merits of such Application/Motion, that the matter be placed on agenda for State Board of Education's December meeting, and that the parties be allowed time for oral argument.

Respectfully Submitted by,  
BRICK GENTRY P.C.



---

David E. Brick (AT0001085)  
6701 Westown Parkway, Suite 100  
West Des Moines, Iowa 50266  
Telephone: (515) 274-1450  
Facsimile: (515) 274-1488  
Email: [dave.brick@brickgentrylaw.com](mailto:dave.brick@brickgentrylaw.com)  
ATTORNEY FOR THE APPELLANT

Original Filed with the  
Office of the Director  
Department of Education  
Grimes State Office Building  
400 E 14th St  
Des Moines, IA 50319-0146

Copy to:

Kristy Latta  
AHLERS & COONEY, P.C.  
100 Court Avenue, Suite 600  
Des Moines, IA 50309-2231

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings by U.S. Mail on Dec 4, 2015.

By: Shelley Beas

BEFORE THE STATE BOARD OF THE  
IOWA DEPARTMENT OF EDUCATION

DEPARTMENT OF  
EDUCATION

NOV 18 2015

RECEIVED

*In re Expulsion of M.K.*

R.K.,  
Appellant,

v.

WEST DES MOINES  
COMMUNITY SCHOOL DISTRICT,  
Appellee.

Admin. Doc. No. 5015

RESISTANCE TO APPELLANT'S  
AMENDED MOTION TO  
STRIKE/ DISMISS APPELLEE'S  
APPLICATION FOR  
REHEARING/MOTION FOR  
RECONSIDERATION

COMES NOW Appellee West Des Moines Community School District (the "School District"), and for its resistance to the Appellant's amended motion to strike/dismiss the School District's application for rehearing/motion for reconsideration, states as follows:

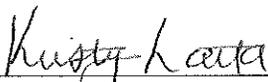
1. Two fundamental legal errors were committed by the State Board in the above-referenced case on November 18, 2015.
2. The Appellant's motion to strike/dismiss is a blatant attempt to distract from the fundamental legal errors that were committed by the State Board.
3. The School District's application for rehearing/motion for reconsideration is entirely proper. The State Board voted to assume jurisdiction of the case. The State Board then considered the case, agreed there is sufficient evidence of M.K.'s misconduct, and voted to remand M.K.'s discipline to the local board. The affirmative majority votes of the State Board constitute final action, of which the School District may now seek reconsideration. *See, e.g., Dillon v. City of Davenport*, 366 N.W.2d 918 (Iowa 1985); *Smith v. City of Fort Dodge*, 160 N.W.2d 492 (Iowa 1968).

4. The Appellant's insinuations and other stated "assum[ptions]" with regard to the School District's application for rehearing/motion for reconsideration are totally unfounded. They belie the Appellant's own intent to push the State Board's illegal actions through to the local board without any opportunity for reconsideration.

5. The Appellant's arguments as to the merits of the case are a red herring. The Appellant wants the State Board to apply the standard of review in Iowa Code Chapter 290, and yet – ironically – he also wants the State Board to ignore the requirement of an affidavit in Chapter 290! Even if it wants to, the State Board has no authority to excuse the Appellant's choice to not comply with this threshold requirement for initiating an appeal.

6. The State Board's actions in this case amount to reversible legal error under Iowa Code Section 17A.19(10).

WHEREFORE, the School District respectfully requests that its application for rehearing/motion for reconsideration be granted, and the mistakes of law or fact be corrected.

  
\_\_\_\_\_  
Kristy M. Latta (AT0004519)  
AHLERS & COONEY, P.C.  
100 Court Avenue, Suite 600  
Des Moines, Iowa 50309-2231  
Telephone: 515/243-7611  
Facsimile: 515/243-2149  
E-mail: [klatta@ahlerslaw.com](mailto:klatta@ahlerslaw.com)  
ATTORNEY FOR APPELLEE

Original filed.

Copy to:  
David E. Brick  
Brick Gentry, P.C.  
6701 Westown Parkway, Suite 100  
West Des Moines, Iowa 50266  
ATTORNEY FOR APPELLANT

01194365-1\11332-121\

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on

December 8, 2015

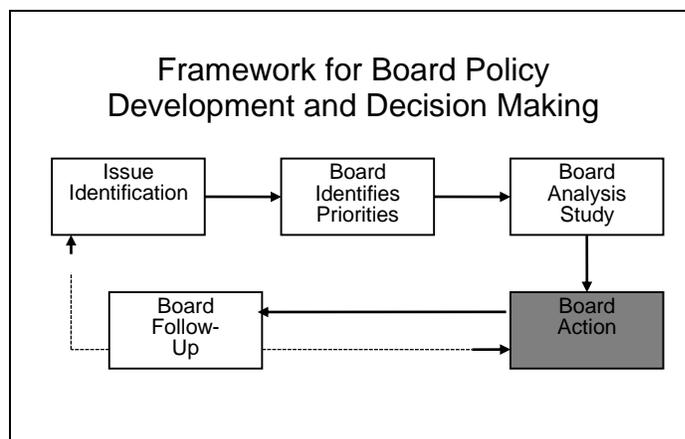
By  U.S. Mail  Fax  
 Hand Delivery  Private Carrier  
 Electronically through CM-ECF

Signature /s/ Anne Stokely

# Iowa State Board of Education

## Executive Summary

December 14, 2015



**Agenda Item:** *In re Open Enrollment of B.M. & J.M. (Lisbon Community School District)*

**Iowa Goal:** All PK-12 students will achieve at a high level.

**State Board Role/Authority:** Under Iowa Code sections 282.18(5) and 290.1, the State Board of Education has authority to hear appeals from local school board decisions denying applications that seek open enrollment due to a “serious medical condition of the student that the resident district cannot adequately address.”

**Presenter:** Legal Counsel

**Attachments:** 1

**Recommendation:** It is recommended that the State Board consider and decide this matter.

**Background:** Attached is a decision reflecting a prior decision by the State Board to modify a proposed decision. On November 18, 2015, the State Board voted to grant B.M. open enrollment based on a serious health condition, but to deny J.M.’s open enrollment appeal.

B.M. was in the 9<sup>th</sup> grade during the 2014-2015 school year and attended Lisbon High School (LHS) and J.M. was in the 6<sup>th</sup> grade. B.M. & J.M. reside in the Lisbon Community School District (LCSD). In April of 2015, the school nurse contacted B.M.’s parents and advised that B.M. was contemplating suicide and they were having an ambulance take him to the hospital. B.M.’s parents immediately came to the school. After a short hospital stay, B.M. returned to school. B.M. has anxiety and depression. Upon his return to school, officials believed they were doing what they could to accommodate B.M.’s needs and provide appropriate interventions for B.M.

On several occasions B.M. experienced anxiety at school. The school nurse communicated with B.M.'s mom on several occasions regarding his level of anxiety. Neither B.M. nor his parents communicated to the school that they were not meeting his needs. Nonetheless, B.M.'s parents felt that the school was communicating with B.M. and not them. Thus, they felt that the Mt. Vernon Community School District (MVCSD) was where B.M. needed to be due to his medical condition. MVCSD has a program that deals specifically with students who consider suicide. J.M. suffers from anxiety as well; however, this was never communicated to the LCSD. The family feels that the MVCSD attends to their needs and additionally they attend church in Mt. Vernon and have friends there. Additionally, they would like to keep both kids in the same district for scheduling and transportation.

The appellants filed a late application for open enrolment on May 7, 2015, alleging that B.M. and J.M. have serious medical conditions that cannot be adequately addressed by the district. The local school board denied the late filed open enrollment application finding that good cause was not met.

The State Board determined that B.M. had a serious medical condition and reversed the decision of the Lisbon school board that denied his open enrollment application. The State Board concluded that it was not proven that J.M. had a serious medical condition.

The Administrative Law Judge's decision was modified accordingly.

**IOWA DEPARTMENT OF EDUCATION**  
**(Cite as \_\_\_ D.o.E. App. Dec. \_\_\_)**

---

<i>In re Open Enrollment of B.M. &amp; J.M.</i>	)	
	)	
T.M. and K.M.,	)	
Appellant,	)	DECISION
	)	
v.	)	
	)	
Lisbon Community School District,	)	Admin. Doc. No. 5012
	)	
Appellee.	)	

---

This matter came before the Iowa State Board of Education at its regularly scheduled meeting on November 18, 2015. The Board reviewed the proposed decision made by Administrative Law Judge Nicole Proesch. That proposed decision is attached hereto and incorporated by this reference.

After being fully advised, the Board modifies Judge Proesch’s proposed decision as follows.

The Board confirms Judge Proesch’s findings and conclusions regarding J.M. The decision of the Lisbon Community School District’s board of directors to deny the open enrollment application concerning J.M. is consistent with the law and the record.

The Board cannot agree with Judge Proesch’s findings and conclusions regarding B.M. In the Board’s view, Appellants have proven that the B.M. has a serious health condition and that Appellee is unable to accommodate B.M.’s needs. We conclude we have the broad discretion to act in B.M.’s best interest, see Iowa Code § 282.18(5), and his best interest require a fresh start in a new school district. If we err, we err in the direction of protecting a young man with significant needs.

DECISION

For the forgoing reasons, Judge Proesch's proposed decision is MODIFIED IN PART. The decision of the Lisbon Community School District board of directors regarding the open enrollment application of J.M. is AFFIRMED. The decision of the Lisbon Community School District board of directors regarding the open enrollment application of B.M. is REVERSED.

---

Date

---

Charles C. Edwards Jr., Board President

State Board of Education

**IOWA DEPARTMENT OF EDUCATION**  
(Cite as \_\_\_ D.o.E. App. Dec. \_\_\_)

---

<i>In re Open Enrollment of B.M. &amp; J.M.</i>	)	
	)	
T.M. and K.M.,	)	
	)	PROPOSED DECISION
Appellant,	)	
	)	
v.	)	
	)	
Lisbon Community School District,	)	Admin. Doc. No. 5012
	)	
Appellee.	)	

---

**STATEMENT OF THE CASE**

The Appellants, T.M. and K.M., seek reversal of a May 14, 2015, decision by the Lisbon Community School District (“LCSD” or “District”) Board of Directors (“LCSD Board” or “Board”) denying a late filed open enrollment request on behalf of B.M. and J.M., to open enroll from LCSD to Mount Vernon Community School District (“MVCSD”). The affidavit of appeal filed by the Appellants on June 16, 2015, attached supporting documents, and the District’s supporting documents are included in the record. Authority and jurisdiction for the appeal are found in Iowa Code § 290.1 (2015). The administrative law judge finds that she and the State Board of Education (“the State Board”) have jurisdiction over the parties and subject matter of the appeal before them.

A telephonic evidentiary hearing was held in this matter on August 14, 2015, before designated administrative law judge, Nicole M. Proesch, J.D., pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. The Appellants were present on behalf of their minor children and represented by attorney Guy P. Booth. Superintendent Patrick Hocking (“Superintendent Hocking”) appeared on behalf of the District. Also present was Ian Dye, the secondary principal, Eric Ries, who is the K-12 Dean of Students, and Roger Teeling, the elementary principal.

The Appellants testified in support of the appeal. Appellant’s exhibits #1-4 were admitted into evidence without objection. Superintendent Hocking testified for the District and no exhibits were offered by the District.

**FINDINGS OF FACT**

T.M. and K.M. reside in the Lisbon Community School District with their children B.M. and J.M., and have for the last fourteen years. B.M. was in the 9<sup>th</sup> grade during the 2014-2015 school year and attended Lisbon High School (“LHS”). B.M. is entering his 10<sup>th</sup> grade year for

the 2015-2016 school year. J.M. was in the 6<sup>th</sup> grade during the 2014-2015 school year and is entering the 7<sup>th</sup> grade for the 2015-2016 school year.

On April 16, 2015, the school nurse, Julie Light, contacted T.M. and K.M. and notified them that B.M. had told her he was contemplating suicide. She advised them that the school would be calling an ambulance pursuant to school procedures to take B.M. to the hospital and they needed to come to the school. Up to this point in the school year Mrs. Light had been in contact with K.M. via email about B.M. and discussed his issues with anxiety. However, T.M. and K.M. had no idea B.M. was contemplating suicide or was having issues with depression. T.M. and K.M. immediately went to the school and met with Mrs. Light and the high school counselor, Mrs. Bischof. They were told that B.M. had contemplated taking pills that morning and that he was depressed and anxious. B.M. was taken to the hospital and was committed to a ward designed to deal with patients with B.M.'s medical needs. He was under the care of Dr. Jeffery D. Wilharm and therapist Tina Reiter. B.M. was there for five nights and was then released to T.M. and K.M. While in the hospital K.M. tried to make arrangements for B.M. to get his homework assignments but there was some confusion over what his assignments were.<sup>1</sup>

After B.M. was released from the hospital and returned to school neither T.M. nor K.M. contacted the school regarding B.M.'s health needs. They testified they did not do so because they were overwhelmed and they thought the school would contact them to see how B.M. was doing. K.M. and Mrs. Light kept in contact via email regarding B.M.'s anxiety level from the time he returned until school ended. However, no one else from the school attempted to contact T.M. or K.M. about B.M.'s issues and how to deal with him for the rest of this school year. K.M. did contact Mr. Ries when he first returned to school regarding the confusion with B.M.'s homework and Mr. Ries helped B.M. get the homework back on track for the remainder of the school year.

After returning home from his hospitalization, B.M. continued to have issues with anxiety and he had to leave the classroom on several occasions due to anxiety. On one occasion, Mrs. Anderson had posted a sign about suicide in the bathroom and B.M. thought the poster was meant for him because he had been discussing his issues with her. On another occasion, Mr. Hofmeister, who is B.M.'s Algebra teacher, stated he could not hold B.M.'s hand through everything and this created more anxiety for B.M. There was no evidence that the District was made aware of these incidents. The school set up several interventions for B.M., which included allowing B.M. to go to the guidance office when he got anxious, rearranging his schedule to accommodate his needs, and providing for class attendance interventions for B.M. However, many of these accommodations were arranged directly with B.M. and K.M. felt like she was left out of the conversations.

B.M. ended the year failing some of his classes even though he had previously been an honor roll student. Over the summer the family did not have any contacts with LCSD. T.M. testified that he is concerned that if B.M. returns to LCSD he will be overwhelmed by his classes and he feels that B.M. needs a fresh start at a larger school that is equipped with dealing with

---

<sup>1</sup> LCSD has a one to one laptop program and the assignments are given over Google Docs. Although, B.M. had his laptop in the hospital he was not sure about his assignments and this caused him to fall further behind.

suicide.<sup>2</sup> T.M. believes that MVCSD really works with students in these situations. K.M. feels that MVCSD staff and coaches have made extra efforts to check on B.M. and LCSD has not. B.M. is currently seeing Dr. Wilharm and Mrs. Reiter every few weeks and is taking four medications for his condition.<sup>3</sup>

There was very little testimony regarding J.M. J.M. also suffers from anxiety and has been seeing a physician and therapist. J.M. was diagnosed three years ago shortly after the family's home was burglarized. J.M. seemed to be doing better until the issues with B.M. arose and now she is getting regular treatment. The District has not been made aware of J.M.'s diagnosis or been asked for any support. However, T.M. and K.M. feel like MVCSD would be a better fit for both of their children. T.M. and K.M. believe J.M. would benefit from the many clubs and organizations that MVCSD offers. B.M. participates in soccer and cross country for MVCSD and the coach has been in contact with K.M. about B.M.'s anxiety. K.M. feels MVCSD is constantly checking on them to see how things are going. The family also attends St. John Baptist Church in Mt. Vernon and the children already have many friends in the district. They would also like to keep both children in the same district for scheduling and transportation reasons.

On or about May 7, 2015, K.M. filed an application for Open Enrollment for B.M. and J.M. from LCSD to MVCSD and noted on the application that B.M. was in the hospital for anxiety and depression and with help of counseling he feels more comfortable with fresh start in a new school. It further stated that B.M. participates in soccer and cross country for MVCSD, they attend church in Mt. Vernon, and they already feel like they are more part of Mt. Vernon than Lisbon. Superintendent Hocking reviewed the application and it was placed on the LCSD Board agenda for May 14, 2015. At the board meeting T.M. and K.M. spoke and read a letter from their children's therapist to the Board.<sup>4</sup> Superintendent Hocking recommended that the Board deny the application because it was made after the March 1st deadline and he believed it did not meet the good cause exception for a serious medical condition because the District had not been provided with information on the specific health needs of B.M. and it had not been given an opportunity to respond to B.M.'s health needs. Additionally, he did not feel they were given enough information from the family to make that determination. The LCSD Board voted 3-1 to deny the application.

On June 9, 2015, the Appellants mailed a timely notice of appeal.

### CONCLUSIONS OF LAW

The Iowa Legislature has given the State Board wide latitude in reviewing appeals under Iowa Code section 290.1 to make decisions that are "just and equitable." Iowa Code § 290.3. The standard of review in these cases requires that the State Board affirm the decision of

---

<sup>2</sup> MVCSD has a program called "You Matter, We Care" which deals with students who are at risk of suicide. Exhibits 2-4.

<sup>3</sup> Dr. Wilharm wrote a letter regarding these proceedings dated June 2, 2015; however this letter was never provided to the local board so we give it no weight in this appeal.

<sup>4</sup> T.M. and K.M. had medical records with them at the board meeting but the Board did not ask for those documents.

the local board unless the local board decision is “unreasonable and contrary to the best interest of education.” *In re Jesse Bachman*, 13 D.o.E. App. Dec. 363 (1996).

The statutory filing deadline for an application for open enrollment for the upcoming school year is March 1. Iowa Code § 282.18. After the March 1 deadline a parent or guardian shall send notification to the resident district that good cause exists for the failure to meet the deadline. *Id.* The law provides that an open enrollment application filed after the statutory deadline, which is not based on statutorily defined “good cause,” must be approved by the boards of directors of both the resident district and the receiving district. *Id.* § 282.18(5).

A decision by *either* board denying a late-filed open enrollment application that is based on an allegation of pervasive harassment or a serious health condition of the student that the resident district cannot adequately address is subject to appeal to the State Board under Code section 290.1. *Id.* § 282.18(5) (emphasis added). The State Board “shall exercise broad discretion to achieve just and equitable results that are in the best interest of the affected child or children.” *Id.*

In this case T.M. and K.M. assert the both B.M. and J.M. have serious health conditions that cannot be adequately addressed by the District. It is well settled that an appellant seeking to overturn a local board’s decision involving a claim of a serious medical condition must meet all of the following criteria for the State Board to reverse the decision and grant such a request:

1. The serious health condition of the child is one that has been diagnosed as such by a licensed physician, osteopathic physician, doctor of chiropractic, licensed physician assistant, or advanced registered nurse practitioner, and this diagnosis has been provided to the school district.
2. The child’s serious health condition is not of a short-term or temporary nature.
3. The district has been provided with the specifics of the child’s health needs caused by the serious health condition. From this, the district knows or should know what specific steps its staff can take to meet the health needs of the child.
4. School officials, upon notification of the serious health condition and the steps it could take to meet the child’s needs, must have failed to implement the steps or, despite the district’s best efforts, its implementation of the steps was unsuccessful.
5. A reasonable person could not have known before March 1 that the district could not or would not adequately address the child’s health needs.
6. It can be reasonably anticipated that a change in the child’s school district will improve the situation.

*In re Anna C.*, 24 D.o.E. App. Dec. 5 (2006); *see also In re Kathryn K.*, 26 D.o.E. App. Dec. 197, 199-200 (2012) and *In re Samantha H.*, 26 D.o.E. App. Dec. 373 (2013).

In this case, there is no question that B.M. has been diagnosed with both anxiety and depression and that the District was aware of the diagnosis. The State Board has found that depression is a serious medical condition. *In re Samantha H.*, 26 D.o.E. App. Dec. at 376. The record does not reflect that B.M.'s medical condition is temporary in any way. Thus, criteria one and two are met with regard to B.M.

The question in this case is whether or not the District was provided with specifics of B.M.'s health needs caused by his condition thus, putting the District on notice of what specific steps the district's staff could do to meet those needs. Here the evidence shows that the Appellants made little if any attempts to communicate with the District about B.M.'s health needs once he returned to school. While we sympathize with the Appellants who felt overwhelmed in this situation, we cannot overlook the fact that they made no attempts to communicate with the District about B.M. or any additional health needs that he had. The record shows the District accommodated B.M. upon his return to school, and the supports provided were objectively reasonable in the circumstances. If B.M. required more than the accommodations he was receiving, the Appellants should have communicated those needs to the District. That is not to say that the District could not have made more attempts to communicate with the Appellants upon B.M.'s return. However, under these circumstances the District cannot be expected to know what specific steps its staff can take to meet the health needs of B.M. Nor, has the District had a chance to implement those needs. Thus, the Appellants failed to carry their burden of proving the existence of the third and fourth criteria.

The appeal regarding J.M. is clearer from a legal standpoint. We do not doubt that J.M. is struggling with anxiety, although there was little evidence presented regarding her diagnosis. Nonetheless, the record is clear that the District was not provided with J.M.'s diagnosis or provided with any specific health needs caused by J.M.'s condition. Thus, criteria one and three are not met with regard to J.M.

The bigger issue for the Appellants appears to be sending both B.M. and J.M. to the same District for convenience. Understandably, if B.M. was allowed to open enroll to another district because of his health condition the Appellants would want J.M. to move also. The family also feels tied to MVCSD because they attend church in that community and B.M. participates in athletics there as well. Clearly, the family feels more support from the MVCSD. However, our open enrollment law does not contemplate an exception for siblings, comfort, or for convenience and even if we had allowed B.M. to open enroll out of the District we could not also allow J.M. to open enroll out of the District under the facts here.<sup>5</sup>

The State Board does not question that B.M. is suffering from anxiety and depression. Clearly, this is a serious condition for B.M. and we do not discount the seriousness of his condition. This case is not about limiting parental choice. The State Board understands that T.M. and K.M. want what is best for B.M. and J.M., who have serious medical conditions.

---

<sup>5</sup> The Appellants have a third child for whom they have not requested open enrollment.

We do not fault them for their decision to enroll their children at MVCSD. Nor does the outcome of this decision limit their ability to transfer to another district or remain at MVCSD.

However, our review focus is not upon the family's choice, but upon the local school board's decision under statutory requirements. The issue for review here, as in all other appeals brought to us under Iowa Code section 282.18(5), is limited to whether the local school board erred as a matter of law in denying the late-filed open enrollment request. We have concluded that the LCSD Board correctly applied Iowa Code sections 282.18(5) when it denied the late open enrollment application filed by the Appellants. Therefore, we must uphold the local board decision.

### DECISION

For the foregoing reasons, the decision of LCSD Board made on May 12, 2015, to deny the open enrollment application of B.M. and J.M. to open enroll from LCSD to MVCSD is hereby AFFIRMED. There are no costs of this appeal to be assigned.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Nicole M. Proesch, J.D.  
Administrative Law Judge

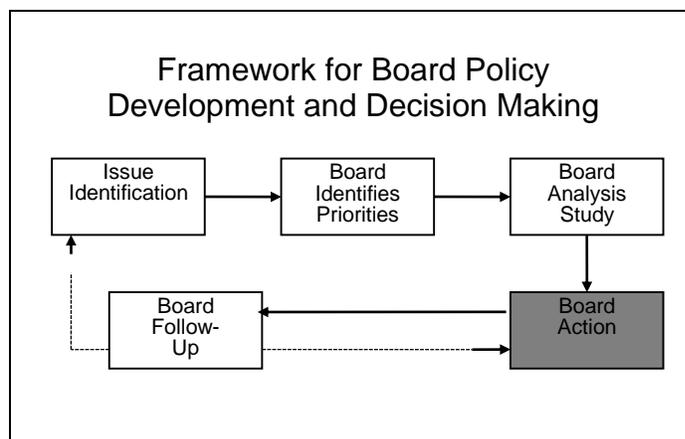
\_\_\_\_\_  
Date

\_\_\_\_\_  
Charles C. Edwards Jr., Board President  
State Board of Education

# Iowa State Board of Education

## Executive Summary

December 14, 2015



**Agenda Item:** *In re Open Enrollment of J.W. & E.W. (Des Moines Independent Community School District)*

**Iowa Goal:** All PK-12 students will achieve at a high level.

**State Board Role/Authority:** Under Iowa Code sections 282.18(5) and 290.1, the State Board of Education has authority to hear appeals from local school board decisions denying applications that seek open enrollment due to “repeated acts of harassment of the student that the resident district cannot adequately address.”

**Presenter:** Nicole Proesch, Administrative Law Judge

**Attachments:** 1

**Recommendation:** It is recommended that the State Board approve the proposed decision affirming the decision of the local board of directors of the Des Moines Independent Community School District denying the open enrollment application filed on behalf of J.W. and E.W.

**Background:** At the time of this appeal, J.W. and E.W. resided in the Des Moines Independent Community School District (DICSD) and in the Hoyt Middle School attendance area. During the 2014-2015 school year, J.W. and E.W. attended Hoyt Middle School. J.W. was subjected to name calling, pencil flicking, and other students kicking his chair. J.W. was also assaulted by another student and the incident was captured on social media in February 2015. E.W. was also verbally harassed by several students while she was waiting for the bus. Administration addressed both issues. However, the Appellant filed an application for open enrollment from the DICSD to the Carlisle Community School District.

The DICSD Board denied the application finding there was no harassment and noting that J.W. is now in the high school and E.W. is attending Weeks Middle School which are new attendance centers. They also agreed to offer J.W. attendance in another district building.

In reviewing an open enrollment decision involving a claim of repeated acts of harassment under Iowa Code § 282.18(5) the Board has set out four criteria that all must be met in order to overturn the decision of the local board. The evidence at the hearing before the administrative law judge showed that with regard to J.W., the harassing behavior was known well before the March 1 deadline. Thus, under the first criterion J.W.'s appeal fails. J.W. may also attend in another attendance center as offered. With regard to E.W., although the incidents occurred after March 1 and were found to be harassing under the third and fourth criteria, the appeal fails because administration stopped the harassing behavior and now E.W. is attending school in another attendance center. Thus, it is recommended that the State Board affirm the proposed decision of the DICSD Board.

The Appellants have appealed the proposed decision. The district requests the State Board affirm the proposed decision. J.W. has requested oral argument before the State Board. The State Board has denied the request for oral argument.

**IOWA DEPARTMENT OF EDUCATION**  
**(Cite as \_\_\_ D.o.E. App. Dec. \_\_\_)**

---

<i>In re Open Enrollment of J.W. &amp; E.W,</i>	)	
	)	
L.W.,	)	
	)	PROPOSED DECISION
Appellant,	)	
	)	
v.	)	
	)	
Des Moines Independent Community	)	Admin. Doc. No. 5019
School District,	)	
	)	
Appellee.	)	

---

**STATEMENT OF THE CASE**

The Appellant, L.W. seeks reversal of a July 7, 2015 decision by the Des Moines Independent Community School District (“DICSD”) Board of Directors (“DICSD Board”) denying a timely filed open enrollment request on behalf of their minor children E.W. and J.W. The affidavit of appeal filed by the Appellants on July 29, 2015, attached supporting documents, and the school district’s supporting documents are included in the record. Authority and jurisdiction for the appeal are found in Iowa Code §§ 282.18(5) and 290.1 (2015). The administrative law judge finds that she and the State Board of Education (“the State Board”) have jurisdiction over the parties and subject matter of the appeal before them.

A telephonic evidentiary hearing was held in this matter on October 1, 2015, before designated administrative law judge, Nicole M. Proesch, J.D., pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. The Appellant was present on behalf of her minor children. The appellee was represented by attorney, Miriam Van Heukelem. Also present with DICSD was Eleanor Shirley, Enrollment Supervisor.

L.W. testified in support of the appeal. Appellant had no exhibits. Mrs. Shirley testified for DICSD and the school district’s exhibits 1-7 were admitted into evidence without objection.

**FINDINGS OF FACT**

L.W. resides in DICSD with her children, J.W. and E.W. and have been residents of Des Moines for 26 years. During the 2014-2015 school year J.W. was in 8<sup>th</sup> grade at Hoyt Middle School. He currently attends Des Moines East as a freshman with many of his middle school classmates. His sister E.W. was in the 6<sup>th</sup> grade at Hoyt Middle School last year. She currently attends Weeks Middle School and is now in the 7<sup>th</sup> grade.

During November of the 2014-2015 school year J.W. began being picked on in class by several classmates. At first, the students would kick his chair or take his pencil. As time passed the behavior escalated to one of the students flicking his head or ear or bumping J.W. in the shoulder. The group of students also called him crude names along with other names. One student threatened to “kick [J.W.’s] ass” after school if J.W. talked to a girl. In December of 2014, while L.W. was out looking at Christmas lights the same group of students went to L.W.’s house and slashed all of their holiday inflatables they had displaying in the front lawn.<sup>1</sup> L.W. witnessed the students running from their house as they drove up.

The behavior finally culminated in an incident on or about February 8, 2015. J.W. was leaving his math class to meet a friend outside. When he got outside the room, a large group of students was waiting for him. Student A got in J.W.’s face and J.W. told him he did not want to fight. Student A punched J.W. in the face. The entire incident was videotaped on another student’s cell phone and then posted on Facebook.<sup>2</sup> The school principal, Mr. Goodhue, called the police and charges were filed on Student A.<sup>3</sup> Student A was suspended for the incident. After the incident was over as J.W. walked to the bus, he was verbally threatened by several other students. Later that evening other students posted messages on Facebook threatening to kick J.W.’s ass and stating they would find out where he lives.

J.W. continued to be verbally teased for the remainder of the school year. Students would say things like J.W. “smells.” However, there were no other threats, physical assaults to J.W., and no other incidents with Student A. Although, there were no other notable incidents, J.W. started having stomach aches and expressed several times that he did not want to go to school. J.W. started to take alternate routes to class to avoid certain students in the halls and in the bathrooms at school because he was afraid of getting attacked. As a result, J.W. also had several tardies.

In March of 2015, when E.W. was in 6<sup>th</sup> grade, several male students began verbally harassing E.W. every day as she was getting on the metro bus at school. These students made extremely vulgar comments to E.W. The Appellant reported this to Principal Goodhue. However, E.W. could not identify which students were bothering her because she did not know their names. Principal Goodhue arranged for E.W. to be escorted to the bus for four days by a hall monitor. There were no other reported incidents. However, the taunts affected E.W.’s self-esteem. E.W. started to pull her hair back in a ponytail and wearing a hooded sweatshirt to school. E.W. also refused to dress out for gym class and this resulted in a failing grade. In April of 2015 L.W. learned from one of E.W.’s teachers that E.W. was cutting herself. L.W. quickly addressed this with E.W. and E.W. has not done this since.

In June 2015, L.W. filed an application for Open Enrollment for both J.W. and E.W. from DICSD to Carlisle Community School District (CCSD). L.W. believes a smaller school with smaller class sizes would be better for J.W. and E.W. On July 7, 2015, the DICSD Board was provided with a short summary of information regarding L.W.’s application from Mrs. Shirley. Mrs. Shirley handles all applications for open enrollment in the district. When she receives an application for open enrollment she contacts the Executive Director for Elementary Schools, Tim

---

<sup>1</sup> This was reported to Principal Goodhue after they returned from winter break.

<sup>2</sup> The video of the incident was not provided as an exhibit.

<sup>3</sup> The police report of the incident was not provided as an exhibit.

Schott, and he follows up with the building principal to determine if a student has been a victim of bullying and harassment. Mrs. Shirley was not provided with any information to indicate that J.W. and E.W. had been bullied or harassed. The summary she provided to the DICSD Board included the following information:

Mom states students have been harassed at current school. No harassment issues have been documented at current school. Additionally, the family recently moved to another MS attendance area in DMPS which should resolve any issues with the MS student. DMPS is able to accommodate the HS student at another building if the family desires.

Based on this limited information the Superintendent recommended that the district could accommodate J.W. and E.W.'s needs in another attendance center. The DICSD Board denied L.W.'s application. On July 29, 2015, L.W. filed a timely notice of appeal.

### CONCLUSIONS OF LAW

The Iowa Legislature has given the State Board wide latitude in reviewing appeals under Iowa Code section 290.1 to make decisions that are "just and equitable." Iowa Code § 290.3 (2013). The standard of review in these cases requires that the State Board affirm the decision of the local board unless the local board decision is "unreasonable and contrary to the best interest of education." *In re Jesse Bachman*, 13 D.o.E. App. Dec. 363 (1996).

Under Iowa Code section 282.18, the statutory filing deadline for an application for open enrollment for the upcoming school year is March 1<sup>st</sup>. The law provides that an open enrollment application filed after the statutory deadline, which is not based on statutorily defined "good cause," must be approved by the boards of directors of both the resident district and the receiving district. Iowa Code § 282.18(5). Open enrollment may be granted at any time with approval of both the resident and receiving school districts. *Id.* § 282.18(14).

A decision by either board denying a late-filed open enrollment application that is based on "repeated acts of harassment of the student or serious health condition of the student that the resident district cannot adequately address" is subject to appeal to the State Board of Education under Code section 290.1. Iowa Code § 282.18(5). The State Board applies established criteria when reviewing an open enrollment decision involving a claim of repeated acts of harassment. All of the following criteria must be met for this Board to reverse a local decision and grant such a request:

All of the following criteria must be met for this Board to reverse a local decision and grant such a request:

1. The harassment must have occurred after March 1 or the student or parent demonstrates that the extent of the harassment could not have been known until after March 1.

2. The harassment must be specific electronic, written, verbal, or physical acts or conduct toward the student which created an objectively hostile school environment that meets one or more of the following conditions:

- (a) Places the student in reasonable fear of harm to the student's person or property.
- (b) Has a substantially detrimental effect on the student's physical or mental health.
- (c) Has the effect of substantially interfering with a student's academic performance.
- (d) Has the effect of substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.

3. The evidence must show that the harassment is likely to continue despite the efforts of school officials to resolve the situation.

4. Changing the student's school district will alleviate the situation.

*In re: Open Enrollment of Jill F.*, 26 D.o.E. App. Dec. 177, 180 (2012); *In re: Hannah T.*, 25 D.o.E. 26, 31 (2007) (emphasis added).

#### *(1) Timing*

The first criterion requires that the harassment must have happened or the extent of the harassment could not have been known until after March 1.

In this case, the objective evidence shows that the harassing behavior complained of by J.W. arose well before March 1, 2015, with the final reportable incident occurring on or about February 8, 2015. The school proactively handled that situation and the offending student was disciplined. After that, the harassment subsided with students resorting to adolescent name calling, which was not reported to the district. Thus, L.W. was aware of the extent of the harassment well before the March 1 deadline. Therefore, the first criterion with regard to J.W. is not met and we need not review the remaining criteria for J.W. However, we find it troubling that none of the information related to the harassment of J.W. and E.W. was communicated to the DICSD Board at the time of the hearing. It appears there is a lack of communication between the local attendance centers and those individuals responsible for making decisions on open enrollment.

With regard to E.W. the objective evidence shows that the objectionable behavior complained of began in March of 2015, just after the deadline had past. Thus, the first criterion is met with regard to E.W.

#### *(2) Pervasive Harassment*

The requirement of an objectively hostile school environment under the second criterion means that the conduct complained of would have negatively affected a reasonable student in

E.W.'s position. This requirement means that the State Board must determine if the behavior of the students created an objectively hostile school environment that meets one or more of the above conditions. The State Board has granted relief under Iowa Code section 282.18(5) in cases of harassment in only three other cases. In each case, the facts established that the experienced harassment involved serious physical assaults, degradation, and destruction of property of those students.<sup>4</sup>

In this case, E.W. was subjected to extremely vulgar and inappropriate sexual comments which would be offensive to anyone. The harassment was affecting E.W. emotionally, physically, and had negative impact on at least one grade. L.W. testified that E.W. started to hide behind a hooded sweatshirt and at one point was self-mutilating. There is no doubt that E.W. was subjected to an objectively hostile school environment. However, the question is whether or not the behavior was pervasive enough to meet the legal definition. While there is no hard and fast rule on what it means to be pervasive, even if we assume for the sake of this case that it meets the definition, under the third and fourth criteria discussed below E.W.'s appeal fails.

### *(3) Efforts of the District*

Under the third criterion, the evidence must show that the harassment is likely to continue despite the efforts of school officials to resolve the situation. Here the evidence shows that L.W. contacted the principal about the harassment that E.W. was experiencing and the principal assigned a hall monitor to accompany E.W. to the bus. After this was done there were no other reportable incidents of harassment. Under these circumstances we conclude the district resolved the situation. Furthermore, E.W. is no longer attending Hoyt Middle School due to her families' recent move to another area of the district. Thus, the third criterion is not met.

### *(4) Change of District*

Although we find the third criterion was not met will analyze the fourth criterion which was the basis of the DICSD Board's decision to deny the open enrollment applications.

Under the fourth criterion, L.W. must show that changing the school district E.W. attends would alleviate the situation. The crux of this criterion is determining whether putting the student in a different environment will make a difference. See *In re Mary Oehler*, 22 D.o.E. App. Dec. 46 (2004). Here it is clear that the principal handled the situation with E.W. and the harassment stopped. Thus, the school has already alleviated the situation and there is no need to move E.W. to another school. Nonetheless, at the time of the hearing before the DICSD Board E.W. had already moved to a new attendance center. Thus, the appeal would also fail on the fourth criterion. The district has also offered to serve J.W. at a different high school then he is currently at if he so chooses.

---

<sup>4</sup> See *In re: Melissa J. Van Bommel*, 14 D.o.E. App. Dec. 281(1997) (The board ordered a student to be allowed to open enroll out of the district for the harassment of the student by a group of 20 students that climaxed when the vehicle the student was riding in was forced off the road twice by vehicles driven by other students); See also *In re: Jeremy Brickhouse*, 21 D.o.E. App. Dec. 35 (2002) and *In re: John Meyers*, 22 D.o.E. App. Dec. 271 (2004). The students in both cases had been subjected to numerous physical assaults and destruction of their property at school.

This case is not about limiting parental choice. The State Board understands that L.W. wants what is best for both J.W. and E.W. The State Board does not fault L.W. for her desire to enroll her children into Carlisle. Nor does the outcome of this decision limit her ability to transfer them there.

However, our review focus is not upon the family's choice, but upon the local school board's decision under statutory requirements. The issue for review here, as in all other appeals brought to us under Iowa Code section 282.18(5), is limited to whether the local school board erred as a matter of law in denying the late-filed open enrollment request. We have concluded that the DICSD Board correctly applied Iowa Code sections 282.18(5) and 280.28(2)(b) when it denied the late open enrollment application filed by L.W. Therefore, we must uphold the local board decision.

## DECISION

For the foregoing reasons, the decision of Des Moines Independent Community School District Board made on July 7, 2015, denying the open enrollment request for J.W. and E.W. is hereby AFFIRMED. There are no costs of this appeal to be assigned.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Nicole M. Proesch, J.D.  
Administrative Law Judge

\_\_\_\_\_  
Date

\_\_\_\_\_  
Charles C. Edwards Jr., Board President  
State Board of Education

**BEFORE THE IOWA DEPARTMENT OF EDUCATION**

---

<i>In re Open Enrollment of J.W. and</i>	)	
<i>E.W.</i>	)	Admin. Doc. 5019
	)	
L.W.,	)	
	)	
Appellant,	)	
	)	APPELLEE’S BRIEF IN SUPPORT
v.	)	OF THE PROPOSED DECISION
	)	
DES MOINES INDEPENDENT	)	
COMMUNITY SCHOOL DISTRICT,	)	
	)	
Appellee.	)	

---

COMES NOW the Appellee Des Moines Independent Community School District (the “District”) and submits this Brief in support of the proposed decision pursuant to Iowa Administrative Code 281-6.17(6), following hearing on October 1, 2015, in the above-referenced appeal.

**I. Factual Background**

The exhibits and testimony presented at the hearing on appeal revealed the following facts in support of affirming the decision of the District to deny the Appellant’s open enrollment request:

During the 2014–2015 school year, J.W. and E.W. both attended Hoyt Middle School. The allegations relating to this open enrollment appeal arose while the students attended Hoyt. Since the beginning of the 2015–2016 school year, J.W. has attended Des

Moines East High School as a 9th grade student and E.W. has attended Weeks Middle School as a 7th grade student.

Appellant L.W. testified at hearing that, beginning in November 2014, J.W. was being picked on by several classmates at Hoyt. This conduct involved minor physical contact (flicking his head, bumping him in the shoulder), name-calling, and one threat to “kick [J.W.]’s ass” if J.W. talked to a certain girl. L.W. also reported that she believed the same group of students slashed their holiday inflatable display on their front lawn in December 2014. On February 8, 2015, L.W. alleged that a group of students at Hoyt confronted J.W. outside of class, resulting in J.W. being punched in the face by Student A. According to Appellant, Student A was suspended. While Appellant alleged that other students continued to engage in name-calling after the February 8 incident, there were no other threats, physical assaults, or incidents with Student A reported for the remainder of the 2014–2015 school year. Appellant did not allege that J.W. had been subjected to bullying or harassment during the current school year at East High School.

With respect to E.W., Appellant reported that several unidentified male students began verbally harassing E.W. in March of 2015 while she was walking to the bus. When Appellant reported this to the Hoyt’s principal, she described the behavior but could not identify the students involved. The principal arranged for E.W. to be escorted to the bus for four days by a hall monitor. Appellant reported that there were no further incidents. Appellant testified that E.W. has not be subjected to bullying or harassment at Weeks Middle School during the current school year.

Appellant applied for open enrollment for J.W. and E.W. to the Carlisle Community School District on June 22, 2015. *See* Appellee's Exhibits 3 and 4. L.W. indicated that the reason for the application was a "change in district of residence due to" the family's July 15, 2015 move. However, this move was to another residence within the District's boundaries. L.W. also included on her application that her students had been subjected to pervasive harassment at Hoyt during the previous school year. During the hearing, she also cited a desire for a smaller school setting as a motivating factor to her request for open enrollment into Carlisle.

Eleanor Shirley, the District's Enrollment Supervisor, testified that the District employs a standard procedure for reviewing open enrollment requests. In most cases where repeated acts of harassment are alleged, the District is able to accommodate the student by transferring him or her to another attendance center within the District. Thus, there would be no need to grant most requests, because the District has many attendance centers for every grade level, and transfer out of the student's current building is generally sufficient to put a stop to any bullying or harassment of that student. Shirley provided the information included in Appellee's Exhibit 5 to the Board when they considered L.W.'s open enrollment request. This information states that "the family recently moved to another [middle school] attendance area in [the District] which should resolve any issues with [E.W.]. [The District] is able to accommodate [J.W.] at another [high school] building if the family desires." Thus, District administration recommended that the open enrollment request be denied because the District "is able to accommodate

the students['] needs.” Appellee’s Exhibit 5. The option of enrolling J.W. and E.W. in other attendance centers within the District was conveyed to L.W. in Appellant’s Exhibits 1 and 2.

## **II. Legal Analysis**

The Iowa open enrollment law is set forth in Iowa Code Section 282.18. In general, applications for open enrollment must be filed on or before March 1 of the school year preceding the school year for which open enrollment is requested. However, there are several exceptions to the March 1 deadline. One of those exceptions is found in Iowa Code Section 282.18(5), which allows for late-filed applications that seek open enrollment due to “repeated acts of harassment of the student.”

The Iowa Department of Education has established a framework for analyzing open enrollment applications based upon allegations of harassment. The criteria to be considered when determining whether to grant such an application are as follows:

1. The harassment must have occurred after March 1 or the student or parent is able to demonstrate that the extent of the harassment could not have been known until after March 1;
2. The harassment must be specific electronic, written, verbal, or physical acts or conduct toward the student which created an objectively hostile school environment that meets one or more of the following conditions:
  - (1) Places the student in reasonable fear of harm to the student’s person or property,
  - (2) Has a substantially detrimental effect on the student’s physical or mental health,
  - (3) Has the effect of substantially interfering with a student’s academic performance,

- (4) Has the effect of substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school;
3. The evidence must show that the harassment is likely to continue despite the efforts of school officials to resolve the situation; and
4. Changing the student's school district will alleviate the situation.

*In re Hannah T.*, 25 D.o.E. App. Dec. 26 (2007). As described below, neither E.W. nor J.W. met these criteria.

The first criterion requires a showing from the Appellant as to why the application for open enrollment of E.W. and J.W. out of the District could not have been timely filed, i.e., on or before March 1. "That is, there must be evidence that the alleged harassment either occurred after March 1, or that the extent of the problem could not have been known until after March 1." *In re Hannah T.*, 25 D.o.E. App. Dec. 26 (2007). The District does not contest that the events relating to E.W. occurred after the March 1 deadline; accordingly, with respect to E.W., this factor is met.

However, the problems complained of by the Appellant relating to J.W. allegedly arose well before March 1, 2015. The Appellant stated that the alleged harassment of J.W. occurred between November and February of the 2014–2015 school year. There is no evidence that the alleged harassment occurred after March 1 such that a timely application could not have been filed by March 1.

Nor is there any evidence that the extent of the problems complained of by the Appellant could not have been known until after March 1. Appellant was aware of the

concerns presented at hearing at least by December, and was informed of the February incident at the time that it occurred. There is nothing in the record that indicates the other students' actions toward J.W. escalated after March 1, either in frequency or severity; indeed Appellant testified that the alleged behavior decreased in severity, involving merely unspecified name-calling. Therefore, there is no legitimate reason why the Appellant could not have filed the open enrollment application by the March 1 deadline with respect to J.W.

Even assuming for purposes of argument only that the alleged conduct in fact occurred and met the statutory definition of harassment, Appellant has not shown the harassment is likely to continue. The Iowa Department of Education has recognized that "local school officials must be given a reasonable opportunity to alleviate the situation before granting an application for open enrollment out of the district." *In re Hannah T.*, 25 D.o.E. App. Dec. 26 (2007).

With respect to E.W., when Appellant reported the verbal harassment toward her daughter, Hoyt's building principal arranged for E.W. to be escorted to the bus, and, according to Appellant, this was sufficient to resolve the harassment and prevent its recurrence. Furthermore, E.W. now attends a different school with different peers, and Appellant reported that she has not experienced bullying or harassment at her new school.

With respect to J.W., according to Appellant, when the February 8 incident occurred, prompt disciplinary action was taken against Student A, and no further conduct qualifying as bullying or harassment occurred after that incident was resolved.

Moreover, Shirley testified that the District would transfer J.W. to another high school within the District if Appellant wished to pursue this action, which would remove J.W. from the peer group of concern during the 2014–2015 school year. The District made a similar offer to transfer E.W., although she is with a different peer group than she had during the 2014–2015 school year. *See also* Appellants Exhibits 1 and 2. Thus, it cannot be concluded as to either E.W. or J.W. that the alleged harassment is likely to continue unless the open enrollment appeal is granted.

The fourth criterion requires the Appellant to demonstrate that changing J.W.’s or E.W.’s school district will alleviate the situation. “The gist of this criterion is whether putting the target of the harassment in a different environment will make a difference.” *In re Hannah T.*, 25 D.o.E. App. Dec. 26 (2007). Based on the record, it is not clear how open enrollment out of the District will make a difference in this situation. The actions taken by the District were effective in preventing future harassment of E.W. and J.W. while at Hoyt. Furthermore, as of the October 1 hearing, Appellant did not report any harassment that had occurred toward E.W. at Weeks or J.W. at East. Finally, it is unnecessary to change the students’ school district, as both can be accommodated at other attendance centers if they so choose.

### **III. Conclusion**

In light of the foregoing, the ALJ’s denial of the application for open enrollment of J.W. and E.W. out of the District was, indisputably, in accordance with the Iowa open enrollment law.

The facts presented by this appeal are substantially different from those presented by cases where the open enrollment was granted. *See, e.g., In re Melissa J. Van Bommel*, 14 D.o.E. App. Dec. 281 (1997) (granting open enrollment to student who experienced harassment by twenty students, culminating with a vehicle in which the student was riding being intentionally forced off the road by vehicles driven by the other students); *In re Jeremy Brickhouse*, 21 D.o.E. App. Dec. 35 (2002) (granting open enrollment to student who was subjected to numerous and specific physical assaults by other students, including various degradations in the locker room); *In re John Myers*, 22 D.o.E. App. Dec. 271 (2004) (granting open enrollment to student who was frequently physically assaulted and had his books and supplies taken by other students at school).

The District does not doubt that the Appellant desires to send E.W. and J.W. to school elsewhere because she believes changing schools is best for her children. The District supports the Appellant's right to make this choice, in this case at the Appellant's own expense:

We acknowledge that Hannah's family has an absolute right to withdraw Hannah from the Woodbine School District, assuming they comply with our compulsory education law, Iowa Code chapter 299. However, that does not mean that the District has a corresponding obligation to allow the withdrawal to occur via open enrollment. This case is not about limiting parental choice. The open enrollment law provides such choice, but when the statutory deadline of March 1 is missed without legal excuse, the resident district will not be compelled to pay for the student to attend a receiving district. In this case, because the behaviors of the other Woodbine students do not meet the definition of harassment, there is no reason under Iowa Code section 282.18(5) for the family to be allowed to use open enrollment to pay for their daughter's education at another district.

*In re Hannah T.*, 25 D.o.E. App. Dec. 26 (2007) (emphasis added).

For the foregoing reasons, the District respectfully requests that the ALJ's decision be adopted by the Iowa State Board of Education.

/s/ Miriam Van Heukelem  
Miriam D. Van Heukelem (AT0010074)  
AHLERS & COONEY, P.C.  
100 Court Avenue, Suite 600  
Des Moines, Iowa 50309-2231  
Telephone: 515/243-7611  
Facsimile: 515/243-2149  
E-mail: mvanheukelem@ahlerslaw.com  
ATTORNEYS FOR APPELLEE

Electronically filed and served on all parties.

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on this date: 11/20/15.

By  U.S. Mail  Fax  
 Hand Delivery  Private Carrier  
 Electronically through CM-ECF  
 Other: e-mail

Signature /s/ MVH