

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

BRIAN TEKOLSTE & BETH TEKOLSTE)
As Parents of REAGAN TEKOLSTE)
9900 South 66th)
Lincoln, NE 68516)

Case No. 04-10

Petitioner,)

FINAL ORDER

v.)

NORRIS SCHOOL DISTRICT #160)
25211 South 68th)
Firth, NE 68358)

Respondent.)

Petitioners filed this appeal pursuant to Neb. Rev. Stat. § 79-234, et seq. (Reissue 2003) and Title 92, NAC, Chapter 61. Petitioners request that the State Board of Education reverse the Respondent Board of Education's decision disapproving the application filed by the Petitioners to enroll their child, Reagan Tekolste, in the Norris School District #160 kindergarten class for the 2004-2005 school year.

The hearing on this matter was convened pursuant to notice at 9:15 a.m. on July 13, 2004, before John M. Boehm, Hearing Officer, appointed by the State Board of Education in the Nebraska State Office Building, Sixth Floor, State Board of Education Conference Room, 301 Centennial Mall South, Lincoln, Nebraska 68509. The Petitioners were represented by attorney John F. Recknor, 2525 "N" Street, P O Box 30246, Lincoln, Nebraska 68503-0246. Respondent was represented by attorney Gregory H. Perry of the law firm of Perry, Guthery, Haase & Gessford, P.C., L.L.O., 233 South 13th Street, #1400, Lincoln, Nebraska 68508. The hearing was recorded by General Reporting Service of Lincoln, Nebraska.

The State Board of Education, having considered the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation, and having been fully advised in the matter, finds that it should adopt and incorporate by reference in its Order as its Findings of Fact and Conclusions of Law, the Hearing Officer's Findings of Fact and Conclusions of Law.

WHEREFORE, the Nebraska State Board of Education, finds, decrees, orders and adjudges:

1. Petitioners' appeal was properly perfected pursuant to Nebraska law and proper notice of hearing was given to all parties.
2. At all times relevant the State Board of Education had jurisdiction over the subject matter and the parties.
3. The State Board of Education has jurisdiction to review the Respondent's decision rejecting Petitioners' application to enroll in the Respondent School District for the 2004-2005 school year pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2003).
4. The State Board of Education finds as a matter of law that the Petitioners must demonstrate that the procedures of Neb. Rev. Stat. § 79-234 through § 79-241 (Reissue 2003) or any other requirements of law have not been followed in the Respondent's action denying Petitioners' application.
5. The State Board of Education finds that the Respondent's Board of Education followed the procedures of Neb. Rev. Stat. § 79-234 to § 79-241 (Reissue 2003) and other applicable law, in rejecting Petitioners' application for their child to attend school in the Respondent School District for the 2004-2005 school year.
6. Petitioners' appeal is denied and Respondent's Board of Education decision to deny the Petitioners' option enrollment application is affirmed.


7. The State Board of Education received a written communication from the Petitioner's dated August 6, 2004, concerning this case. This communication was an *ex parte* communication. A disclosure of this communication was filed by members of the Board on August 12, 2004, and the Respondent was provided with notice of it and an opportunity to respond. The Respondent, on August 13, 2004, filed a Response to the disclosure of the *ex parte* communication. In reaching this Final Order, the State Board of Education has not considered the content of this *ex parte* communication.

8. Any Finding of Fact which is more properly considered a Conclusion of Law shall be so construed. Alternatively, any Conclusion of Law which is more appropriately considered as a Finding of Fact shall be so construed.

9. The Hearing Officer's Findings of Fact and Conclusions of Law are hereby adopted in all respects and made a part of this Order by this reference to the same extent and like effect as though such Findings of Fact and Conclusions of Law were fully set forth verbatim herein.

Dated this 13th day of August, 2004.

NEBRASKA STATE BOARD OF EDUCATION



Fred Meyer, President
State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 04-11, on August 13, 2004, was 6 in favor, 2 against, _____ abstaining, and _____ absent.

Individual State Board members voted as follows:

IN FAVOR: F. Meyer, B. Peterson, K. Peterson, P. Timm, K. Imes, J. Higgins

AGAINST: _____

ABSTAINING: _____

ABSENT: _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon Brian and Beth Tekolske, 9900 South 66th, Lincoln, NE 68516, John F. Recknor, 2525 "N" Street, P.O. Box 30246, Lincoln, NE 68503-0246, and Gregory Perry, Perry, Guthery, Haase & Gessford, P.C., L.L.O., 233 South 13th Street, #1400, Lincoln, NE 68508, via certified United States mail, return receipt requested; and Margaret Worth, General Counsel, Nebraska Department of Education, 301 Centennial Mall South, Lincoln, NE 68509, via hand delivery, all on this 13th of August, 2004.

Brenda L. Wid

BEFORE THE STATE BOARD OF EDUCATION
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Case No. 04-10

Petitioner,)

v.)

NORRIS SCHOOL DISTRICT #160)
25211 South 68th)
Firth, NE 68358)

Respondent.)

HEARING OFFICER'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATION

Petitioners filed this appeal pursuant to Neb. Rev. Stat. § 79-234, et seq. (Reissue 2003) and Title 92, NAC, Chapter 61. Petitioners request that the State Board of Education reverse the Respondent Board of Education's decision disapproving the application filed by the Petitioners to enroll their child, Reagan Tekolste, in the Norris School District #160 kindergarten class for the 2004-2005 school year.

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pursuant to a Prehearing Conference Order, dated June 28, 2004, as modified by the Orders of July 6, 2004, and July 8, 2004. The hearing was conducted pursuant to the Nebraska Department of Education Rules of Practice and Procedure for Hearings in Contested Cases Before the Department of Education, Title 92, NAC, Chapter 61.

The parties have agreed that the issue to be decided by the State Board of Education in this matter is as follows:

Whether the capacity enrollment figures adopted for the 2004-2005 school year for the kindergarten class for the Norris School District should limit the school's enrollment, because in the past Norris School District has allowed higher actual enrollment numbers than the established capacity figures?

The parties jointly offered Exhibits 1 through 20 which were received and which include the following:

1. Enrollment Option Program Implementation as revised October 9, 1997.
2. Norris School District's September 14, 1999 meeting minutes.
3. Letter to Option Parents from Larry Grosshans.
4. Enrollment Option Program as amended May 10, 2001.
5. Norris School District March 10, 2004 meeting minutes.
6. Resolution 2004-2005 Standards for Option Enrollment Applications.
7. Letter to Option Enrollment Parents from Dr. Roy Baker.
8. Application of Reagan M. Tekolste for student transfer/enrollment option program and District response.
9. Letter dated March 31, 2004, from Dr. Roy Baker with attachments.
10. Letter dated April 4, 2004, from Larry Grosshans.

11. Letter to School Board Members from Mr. and Mrs. Tekolste.
12. Letter dated April 22, 2004, to Dr. Baker from Mr. and Mrs. Tekolste.
13. Letter dated April 23, 2004, from Dr. Roy Baker.
14. School Board Resolution for 2001-2002 Standards.
15. School Board Resolution for 2002-2003 Standards.
16. School Board Resolution for 2003-2004 Standards.
17. Norris School District #160 Membership Report.
18. 2001-2002 Annual Statistical Summary.
19. 1999-2000 Fall Membership by Grade.
20. Title 92 NAC Chapter 61.

In addition, the Hearing Officer took official notice of the Nebraska Department of Education case file for this case. The Petitioners presented three witnesses, Brian Tekolste, Beth Tekolste and Dr. Roy Baker. Dr. Baker was cross-examined by the Respondent's counsel.

The Hearing Officer, having considered the evidence received and the arguments of the parties, makes the following proposed Findings of Fact, Conclusions of Law and Recommendations.

FINDINGS OF FACT

1. The Petitioners timely filed an option enrollment application on September 2, 2003, to have their child, Reagan M. Tekolste, attend the Norris School District #160 kindergarten class of 2004-2005. (Exhibit 8) The application stated that the child is a sibling of a current option student.
2. The Petitioners reside in Lancaster County School District #0153, Cheney Public School.

3. Shortly after the March 10, 2004, meeting of the Norris Board of Education, the Petitioners were notified that their option enrollment application was denied for the reason that the enrollment for that grade level was at capacity. (Exhibits 5, 7 and 8)

4. The Petitioners timely filed a petition on April 9, 2004, for an appeal to the State Board of Education, appealing the rejection of their application.

5. The current option enrollment policy for the Norris School District was adopted by the Board of Education on May 10, 2001, (Exhibit 4) and provides in part as follows:

The District establishes the following standards for the acceptance or rejection of applications.

1. An enrollment application shall be rejected in the event the capacity of a program, class, grade level, school building, or the availability of appropriate special education programs operated by the District will be exceeded by acceptance of the application.

2. The capacity of such programs are:

Kindergarten, Grade 1, and Grade 2: 110.

6. On March 10, 2004, the Board of Education of the Norris School District adopted standards relating to the option enrollment policy for the 2004-2005 school year, which included the establishment of the program capacity of the kindergarten grade level at 110 students and the projected enrollment for the kindergarten grade level at 110 students, thus indicating that the kindergarten grade level was at capacity. Twenty applications for enrollment in the kindergarten grade level, including that of the Petitioners, were denied. (Exhibit 6)

7. The Petitioners have three older children who attend Norris School District, all of whom were optioned in at the kindergarten level. Both of the Petitioners attended the Norris

School District. The Petitioners moved to their present residence in 1997 which is just across the road from the Norris School District.

8. The Petitioners had visited their youngest child's kindergarten classroom this year and in their opinion it did not appear to be crowded and could accommodate another desk or two.

9. The Board of Education of the Norris School District adopted enrollment capacity standards for the 2001-2002, 2002-2003, and 2003-2004 school years which set the capacity for the kindergarten grade level at 110. (Exhibit 14, 15 and 16) Based on this capacity standard, the District accepted five option students in 2001-2002, ten in 2002-2003 and twelve in 2003-2004.

10. The evidence relating to actual student enrollment in the kindergarten grade level in the Norris School District is as follows (Exhibits 17, 18 and 19):

Summary of Kindergarten Enrollment

Year	Average Daily Membership	Fall Membership
1993-1994	91.06	91
1994-1995	86.12	88
1995-1996	92.16	91
1996-1997	111.12	110
1997-1998	86.22	89
1998-1999	102.0	100
1999-2000	103.39	99
2000-2001	86.60	88
2001-2002	109.41	107
2002-2003	119.58	119
2003-2004	100.00	100

11. The School District, has determined that the maximum number of students for each kindergarten section should not exceed 22 students. That number has been in effect prior to the tenure of the current Superintendent, Dr. Roy Baker, who assumed the position of Superintendent in July of 1997. That number is based on the educational philosophy of the School District which emphasizes minimizing the student/teacher ratio and individualized attention for each student.

12. In the professional opinion of Dr. Roy Baker, a kindergarten section should ideally be smaller than the established capacity level of 22, probably 18 or less, but given budget constraints and the realities of the situation, 22 is the upper limit for capacity. This limitation is necessitated in part by the time requirements for meeting curriculum standards and conducting assessments, as well as the School District's goal of getting students to grade level or above in reading. There is a major emphasis on this objective in kindergarten and the first and second grades. The capacity figure of 22 is comparable with other Nebraska schools in terms of optimum size limitations. Dr. Baker, however, did not know of a specific text or treatise which would demonstrate that research indicates that 22 is the maximum capacity level for a kindergarten classroom. In his opinion, however, the teachers get uncomfortable with even 22 students in a kindergarten classroom, and the teachers would indicate that there is a difference between a classroom with 24 or 25 students and one with 20 or 21.

13. The District has currently authorized five sections of kindergarten of 22 students for a total capacity of 110. The District regularly had five sections of kindergarten beginning with the 1998-1999 school year and has had five sections since except for the 2002-2003 school year. In the 2002-2003 school year, the final kindergarten enrollment exceeded this capacity with 119 students, and the Board hired an additional teacher and operated six sections of kindergarten.

According to Dr. Baker, if the actual kindergarten enrollment for 2004-2005 exceeded the 110 capacity, it would be necessary to hire another teacher and have six sections of kindergarten.

14. In the 2002-2003 school year, the Board of Education had projected an enrollment of 100 and therefore accepted ten option students to meet the program capacity of 110. During the interim summer months, additional children moved into the District, resulting in actual enrollment of 119 kindergarten students. As a result and in accordance with its policy of 22 students per section, the District created a sixth section of kindergarten for that school year and hired another teacher. The District has continued to maintain a sixth section for that class year as it has progressed through different grades. In other class years where the numbers of students have expanded because of the growing population of the District to exceed the established capacity level, the School District has also expanded to six sections.

15. The District took extra steps this year to get a good handle on projected kindergarten enrollment, including a kindergarten round-up in order to be as accurate as possible before the March Board meeting.

16. When the elementary school building was expanded in 2002, the District had built a couple of swing classroom to take care of the occasional large student groups that come through requiring six sections instead of the original capacity number of five sections per class. Even with the recent expansion, which resulted in nine new classrooms, the District is presently using every available space for classrooms. As a result, the elementary building currently has a program capacity of 675 students and a projected enrollment of 710. When enrollment continues to exceed program capacity, it leads to bond issues to build new classrooms.

17. The original elementary building was laid out in pods with four classrooms and a smaller space in the middle used by all four classes. Since there is not room for a sixth section of

kindergarten in the new kindergarten wing, a sixth kindergarten section would have to take over an existing classroom in a pod used by another grade, and that displaced class would be forced into the center space of a pod. The center of a pod can only accommodate 16 students. This affects not only the displaced section, but also the other three sections in that pod, none of whom are able to use the space in the middle for programs, assemblies, team teaching and other functions. Adding another section of kindergarten would thus impact the education of 120 some children giving them less opportunities than would have existed with only five sections of kindergarten.

18. In the professional opinion of Dr. Roy Baker, the 110 grade level capacity for kindergarten is a reasonable number given the classroom availability in the Norris School District. In his professional opinion as an educator, the projected enrollment and program capacity standards set forth in the option enrollment policy and the option enrollment standards for the kindergarten level for the 2004-2005 school year are reasonable and consistent with the information available at the time the standards and policies were set.

19. When the Board of Education set the program capacity numbers, it took into consideration the criteria set forth in statute, including available staff, facilities, and projected enrollment of resident students.

20. Any finding of fact which is more properly considered a conclusion of law shall be so construed. Alternatively, any conclusion of law which is more properly considered as a finding of fact shall be so construed.

CONCLUSIONS OF LAW

The Petitioners timely filed their application with the Respondent School District and said application was in turn timely rejected by the Respondent. Petitioners perfected their appeal

to the State Board of Education in a timely fashion, and pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2003), the State Board of Education has jurisdiction over this matter and the parties thereto.

Neb. Rev. Stat. § 79-239 (Reissue 2003) requires that the Petitioners demonstrate that the Respondent School District has failed to follow the procedures of Neb. Rev. Stat. § 79-234 through § 79-241 in rejecting Petitioners' application for their child to enroll in the Respondent School District for the 2004-2005 school year. The State Board of Education has also consistently maintained that it has authority to determine whether Respondent's rejection of the Petitioners' application complies with other requirements of law.

Neb. Rev. Stat. § 79-238(1) (Reissue 2003) provides as follows:

Except as provided in Section 79-240, the school board or board of education of the option school district shall adopt by resolution specific standards for acceptance or rejection of applications. Standards may include the capacity of a program, class, grade level, or school building or the availability of appropriate special education programs operated by the option districts. Capacity shall be determined by setting a maximum number of option students that a district will accept in any program, class, grade level, or school building, based upon available staff, facilities, projected enrollment of resident students, projected number of students with which the option district will contract based on existing contractual arrangements, and availability of appropriate special education programs. The school board or board of education of the option school district may by resolution declare a program, a class, or a school unavailable to option students due to lack of capacity. Standards shall not include previous academic achievement, athletic

or other extracurricular ability, disabilities, proficiency in the English language, or previous disciplinary proceedings except as provided in Section 79-266.01.

This statute expressly grants school boards the power and authority to include capacity as a standard and to declare programs, classes, grade levels, and school buildings unavailable to option students due to lack of capacity based upon available staff, facilities and projected enrollment. On its face this appears to be what the Respondent School Board has done in the present case.

The State Board has also consistently held that such determinations by a school board cannot be contrary to the express legislative purpose of the enrollment option statutes as set forth in Neb. Rev. Stat. § 79-232(1) (Reissue 2003):

The Legislature finds and declares that parents and legal guardians have the primary responsibility of insuring that their children receive the best education possible. In recognition of this responsibility, the Legislature intends to provide educational options for parents and legal guardians when deciding what public school or public school district is best for their children, by allowing them to consider the following factors, including but not limited to:

- (a) The size of the schools and school districts in the area;
 - (b) The distance children have to travel and the ease and availability of transportation;
 - (c) the course offerings and extracurricular offerings of the schools and school districts in the area;
 - (d) The quantity and quality of the staff at such schools and school districts;
- and

(e) The performance of the school district on any indications of performance established by the State Department of Education.

In this regard, the Petitioners did not claim any of the above factors as reasons for their request, merely that their child had siblings enrolled in the option school district.

The State Board of Education has consistently held in such appeals that in order for the Petitioners to prevail, they have the burden to prove by a preponderance of the evidence that the Respondent failed to follow procedures of the Nebraska Enrollment Option Program in denying their applications. Enrollment Option Appeals, Lancaster County School District #001, a/k/a Lincoln Public Schools, NDE Case Nos. 95-06EO, 95-07EO, and 95-09EO through 95-12EO. See also Department of Social Services v. Person, 234 Neb. 865, 874, 453 N.W.2d 390 (1990); Russell v. Board of Regents, 228 Neb. 518, 520, 423 N.W.2d 126, 128 (1988).

The Board of Education has also taken the position that a district's factual determinations as to capacity, are subject to challenge, and that such factual determination by a school board cannot be upheld if it is unreasonable or arbitrary. Langin v. Chase County School District #0003, a/k/a Imperial Elementary School, NDE Case No. 92-18EO; see also Galstan v. School District of Omaha, 177 Neb. 319, 128 N.W.2d 790 (1964).

On the other hand, where an action of a public body is within the scope of authority of such body there is a presumption that it is valid and reasonable. The one who raises the question has the burden of proving the facts showing the invalidity of such act. 73 CJS Public Administrative Law and Procedure, § 93(c) at 607-10. See also Hansen v. City of Norfolk, 201 Neb. 532, 359 (1978), and 56 Am.Jur.2d Municipal Corporations, § 383 at 422. These rules are equally applicable to school board resolutions. See Richardson v. Braham, 125 Neb. 142, 145 (1993): "To overturn a city ordinance on the grounds that it is unreasonable and arbitrary. . . , the

evidence and such facts must be clear and satisfactory. A regulation by a school board is analogous to an ordinance and is tested by the same general principles.” Likewise:

If a school board acts within the power conferred upon it by the Legislature, courts cannot question the manner in which the board has exercised its discretion in regard to subject matter over which it has jurisdiction, unless such action is so unreasonable and arbitrary as to amount to an abuse of discretion reposed in it. Kolesnick v. Omaha Public School District, 251 Neb. 575 (1997).

Robertson v. School District No. 17 of Lancaster County, 252 Neb. 103, 113 (1997). See also Galstan v. School District of Omaha, *supra*. “An arbitrary action is one which is taken ‘in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion’.” Kolesnick, *supra* at 583.

The Petitioners argue that the decision of the State Board of Education in Cooksley v. Hall County School District No. 3, Case No. 95-28EO is applicable to this appeal. In the Cooksley case, the State Board of Education found that the number of students in each grade had almost always been greater than the capacity established by the school district for that grade. It was also found that the numbers established for enrollment option purposes had no relation to the capacity of any class or program or the splitting of grades into multiple classes and the resulting hiring of additional teachers. In fact, the acceptance or rejection of the petitioners’ enrollment option applications in that case would not have resulted in any grade needing to be split or the respondent needing to hire any additional staff. The State Board therefore found that the numbers established by the school’s policy did not establish a capacity permitted by the factors outlined in statute and as such was arbitrary and unreasonable and did not justify the decision to

deny the enrollment option applications. The Cooksley decision is predicated upon a different set of facts and circumstances than the present case and is not directly analogous.

The Petitioners' principle argument here seems to be that the Respondent Board of Education's decision to establish capacity for a kindergarten section at 22 is not based upon any scientifically sustainable or documentable justification for the limitation on the size of a kindergarten class. In this regard, Petitioners note that Dr. Baker was not able to cite any specific standard establishing 22 as a maximum capacity number. On the other hand, however, based upon his professional opinion, experience and expertise, he testified that 22 was a reasonable maximum limit and that a smaller number such as 18 would probably be a better size for a kindergarten class. To the contrary, the Petitioners, upon whom the burden of proof lies, presented no evidence to establish that a higher limit was justifiable or sustainable. Dr. Baker's testimony and professional opinion in this matter is the only real evidence offered on this point. Given the burden of proof and the evidence in the record there is no real basis for concluding that the decision of the School Board to place an upper limit on capacity for a kindergarten section of 22 is arbitrary or unreasonable, as there are a number of sound reasons articulated by Dr. Baker to support that proposition.

The Petitioners also raise the question of whether, if 22 is a reasonable class size, does that necessarily make 23 an unreasonable size, implying that adding one additional student to one of the sections would not be such a significant change so as to make the classroom size unworkable. While it is true that only two of the option enrollment applicants, appealed to the State Board for the current year, and only one is making this particular argument before the State Board, that is not the decision that was faced by the Respondent Board of Education. The Respondent had determined, that its overall kindergarten capacity was 110 consisting of five

sections of 22, and that the expected enrollment was also 110. The question facing the Board of Education was not whether to add one additional option enrollment student, i.e. the Petitioners' child, but whether to allow twenty additional option enrollment students. This would clearly have required the District to establish a sixth section of kindergarten and to hire another teacher just as they were forced to do in the 2002-2003 school year when the actual enrollment subsequently exceeded the anticipated enrollment after allowance of ten option enrollment students. Moreover, adding a sixth section of kindergarten when current classrooms are all full would disrupt 120 other students and interfere with their educational opportunities.

In this case, also contrary to the situation in Cooksley, supra, the Respondent School Board's decision to establish a level of five sections of kindergarten each with a maximum capacity of 22, was clearly not a number that was established so as to preclude any option enrollment students from being permitted. In fact, in 2001-2002 five option enrollment students were allowed, in 2002-2003 ten were allowed, and in 2003-2004, twelve option enrollment students were allowed in the kindergarten program. In this regard, the 2002-2003 school year appears to be the only year in which actual enrollment exceeded capacity. That was not a planned decision made by the Board, but a result that was thrust upon the Board by additional students moving into the District after the option enrollment decision. The Board was then forced to make the decision to add another kindergarten section in accordance with its section capacity policy and to hire another teacher. This exceptional situation does not negate the Board's prior or current policy decisions on capacity. Capacity is obviously more than a physical calculation, i.e. how many students can fit in a classroom, but rather is a complex consideration involving educational goals and priorities, available staff and existing facilities, weighed against projected enrollment numbers. In this regard, see Langin v. Chase County School District #0003,

supra, where the decision of the State Board of Education was predicated upon a determination that the law did not intend an option district to be placed in a situation where it would be forced to hire an additional teacher. Moreover, the sixth section for the 2002-2003 class year has obviously affected subsequent years' capacity determinations including the 2004-2005 year. What the District was forced to do in 2002-2003 is thus not an indication of current capacity.

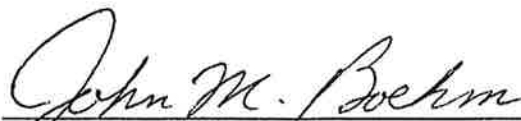
It is apparent from the testimony of Dr. Baker, that the option enrollment policy and standards adopted by the Board not only for 2004-2005, but for prior years, were based upon the statutory criteria for capacity including available staff, facilities, and projected enrollment of resident students. Given the record before this Board, the decision of the Respondent School Board cannot be said to be arbitrary and unreasonable. The Petitioners have not met their burden in this regard. Therefore, there is no basis for a determination that the procedures of Neb. Rev. Stat. § 79-234 through § 79-241 (Reissue 2003), nor any other requirements of law, were not followed by the Respondent School District. Therefore, the determination of the Respondent Board of Education in rejecting the application for option enrollment of Petitioners' child should be affirmed.

RECOMMENDATION

The following is the recommendation of the Hearing Officer:

1. That the Respondent Board of Education's decision to deny the Petitioners' option enrollment application be affirmed.
2. That the State Board of Education, as a part of its order, adopt the Hearing Officer's Findings of Fact and Conclusions of Law in all respects, and that such be made a part of its order by reference to the same extent and like effect as if those Findings of Fact and Conclusions of Law were fully set forth verbatim in its order.

Dated this 30th day of July, 2004.



John M. Boehm, #15550, Hearing Officer
811 South 13th Street
Lincoln, NE 68508
(402) 475-0811

CERTIFICATE OF SERVICE

The undersigned, John M. Boehm, hereby certifies that the original of the foregoing with attached transcript was hand delivered to Margaret D. Worth, General Counsel, Nebraska Department of Education, 301 Centennial Mall South, Lincoln, Nebraska on July 30, 2004, and a true and correct copy of the foregoing was served by first class United States Mail, postage prepaid, on July 30, 2004, to the following parties:

Gregory H. Perry
233 S. 13th St., Suite 1400
Lincoln, NE 68508

John F. Recknor
2525 "N" Street
P O Box 30246
Lincoln, NE 68503-0246



John M. Boehm, #15550, Hearing Officer