BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

GREGORY G. RETTELE and HEIDI L. BARRY-RETTELE, As Parents of HOUSTON G. RETTELE 6801 Summerset Court Lincoln, NE 68516 Petitioners, v. NORRIS SCHOOL DISTRICT #160 25211 South 68th Firth, NE 68358 Respondent.	)	Case No. 04-11 FINAL ORDER

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, Houston G. Rettele, 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 8:07 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 appeared and represented themselves. The Respondent was represented by attorney Gregory H. Perry of the law firm of Perry, Guthery, Haase & Gessford, P.C., LLO. 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 requirement 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. 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.

8. 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

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 8 in favor, _____ against, _____ abstaining, and _____ absent. Individual State Board members voted as follows:

IN FAVOR: F. Meyer, B. Peterson, K. Peterson, A. Mactier, R. Bone, P. Timm, J. Higgins

AGAINST: _____

ABSTAINING: _____

ABSENT: _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon Gregory Rettele and Heidi Barry-Rettele, 6801 Summerset Court, Lincoln, NE 68516 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. Reid

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

GREGORY G. RETTELE and HEIDI L. BARRY-RETTELE, As Parents of HOUSTON G. RETTELE 6801 Summerset Court Lincoln, NE 68516 Petitioners, v. NORRIS SCHOOL DISTRICT #160 25211 South 68th Firth, NE 68358 Respondent.	)	Case No. 04-11 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, Houston G. Rettele, 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 8:07 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 appeared and represented themselves. The Respondent was represented by attorney Gregory H. Perry of the law firm of Perry, Guthery, Haase & Gessford, P.C., LLO. The hearing was recorded by General Reporting Service of Lincoln, Nebraska. This hearing was held pursuant to a Prehearing Conference Order entered June 28, 2004, and 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 jointly offered Exhibits 1 through 9 which were received and which include the following:

1. Norris School District Option Enrollment Policy, Revised October 1997.
2. Minutes of September 14, 1999, School District Board meeting.
3. Letter from Dr. Larry Grosshans to Option Parents sent August/September 1999.
4. Norris School District Option Enrollment Policy as revised May 2001.
5. Minutes of March 10, 2004, School Board meeting.
6. Option Enrollment Standards for 2004-2005 school year.
7. Letter from Dr. Roy Baker to Option Enrollment Request Parents, sent to Option Applicants following the March 10, 2004, Board meeting.
8. Application for Option Enrollment for Houston G. Rettele and denial.
9. April 4, 2004, letter from Dr. Larry Grosshans to Dr. Roy Baker.

In addition, the Respondent offered as Exhibit 10, Rule 61 which was received without objection. The Hearing Officer took official notice of the Nebraska Department of Education case file for this case. Mr. Gregory G. Rettele testified on his own behalf and was cross-examined by the attorney for the Respondent and examined by the Hearing Officer. A stipulation was entered by the parties that if Petitioner, Heidi L. Barry-Rettele, was called as a witness, her testimony would agree with the testimony given by her husband.

Pursuant to the Prehearing Conference held by the parties in this matter, and the Prehearing Conference Order dated June 28, 2004, the parties agreed that the issue to be decided by the State Board of Education in this matter is as follows:

Whether there should be a grandfather clause in the current open enrollment policy of the Norris School District for the reason that the Petitioners relied to their detriment on the previous policy in effect in 1998, and that the School District is therefore estopped and precluded from denying the provisions of the previous policy as to the sibling exception as it pertains to the Petitioners?

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 recommendation.

FINDINGS OF FACT

1. The Petitioners timely filed an option enrollment application to have their child, Houston G. Rettele, attend the Norris School District #160, in the kindergarten class of 2004-2005, on September 2, 2003. (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 0001, Lincoln Public Schools.

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 7 and 8)

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

5. The enrollment option program for the Norris School District as amended by the Board of Education on October 9, 1997, included the following pertinent provision (Exhibit 1):

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

1. Siblings of option enrollment students are eligible for option enrollment.

6. Petitioner Gregory Rettele, had two older daughters from a prior marriage that had lived in the Norris School District until his oldest daughter was in the fourth grade. His third daughter from that prior marriage qualified as an option enrollment student in the Norris School District in the kindergarten class of 1998-1999. Petitioner, Gregory Rettele before moving to Lincoln had lived in Princeton which is in the Norris School District.

7. The Petitioners were married on March 14, 1998, and in the spring of that year, sold the residence in Princeton and moved to Lincoln. The two older daughters continued to attend the Norris School District, and as indicated above, the younger daughter from Gregory Rettele's prior marriage was optioned into the Norris School District for the 1998-1999 school year.

8. At the time the Petitioners sold the residence in the Norris School District and moved to the Lincoln School District, the Norris School District Option Enrollment Policy that was in effect, provided for the option enrollment of siblings of existing option enrollment students.

9. On September 14, 1999, the Board of Education of the Norris School District amended its option enrollment policy. That policy no longer included an exception for siblings of option enrollment students. Prior to amending that policy, the District sent a letter to parents of option students, including the Petitioners, which stated that the amendment was being considered and informing them that the prospective change "no longer permits siblings of students already optioned into the Norris system to automatically be accepted for enrollment, just because they are siblings. Siblings will only be accepted into classes and/or programs where

enrollment is less than the capacity established by the Board of Education with priority given by statute or order in which applications are received." (Exhibits 2 and 3)

10. On May 10, 2001, the Board of Education of the Norris School District further amended its option enrollment policy which provides in its pertinent provisions as follows:

> The District establishes the following standards for the acceptance or rejection of applications.
>
> 1. An option 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 would be exceeded by acceptance of the application.
>
> 2. The capacity of such programs are: kindergarten, grade 1, grade 2: 110.

As in the 1999 policy, the 2001 amended policy also did not include an exception for siblings of option enrollment students. (Exhibit 4)

11. 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, which meant that the kindergarten grade level was at capacity. Twenty applications for enrollment in the kindergarten grade level, including that of the Petitioners, were therefore denied. (Exhibit 6)

12. The existing policy regarding the eligibility of option enrollment students by the School District in 1998 was a significant factor in the decision which involved the Petitioners move to Lincoln and out of the Norris School District where Mr. Rettele's three oldest children

continued to attend school in the Norris School District. No one from the School Board or any other school official promised the Petitioners that the Board's policy regarding option enrollment for siblings would not be changed in the future. Had the current policy been in effect in 1998, when the Petitioners made their decision to move, they might have made a different decision.

13. Prior to being amended by LB1050 in 1996, Subsection 4 of Section 79-240 (formerly Section 79-3409) provided as follows:

> The sibling of any option student shall be automatically accepted as an option student in the district in which the option student is enrolled. . .

14. Effective April 6, 1996, Subsection 4 of Section 79-240 was amended to read in its pertinent part as follows:

> The sibling of any option student who has, before April 6, 1996, been accepted as an option student in the district in which the option student is enrolled shall be eligible to continue attending the option school district as an option student as provided in Section 79-234.

15. 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 requires the Petitioners to demonstrate that the Respondent School District

has failed to follow the procedures of Neb. Rev. Stat. § 79-234 through § 79-241 (Reissue 2003) 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.

In 1992 the option enrollment statutes were amended to provide for a "sibling exception". The amended provided that "the sibling of any option student shall be automatically accepted as an option student. . . ." LB1001, Section 39 codified as Neb. Rev. Stat. § 79-3409(4), which is now Section 79-240(4). In 1996, the Legislature repealed this sibling exception in LB1050, Section 9, and Neb. Rev. Stat. § 79-240(4) now reads as follows: "The sibling of any option student who has, before April 6, 1996, been accepted as an option student in the district in which the option student is enrolled shall be eligible to continue attending the option school district as an option student as provided in Section 79-234." After this date school districts were no longer required by law to provide a sibling exception in their open enrollment policies, other than that a sibling who had been accepted before April 6, 1996, as an option enrollment student, was eligible to continue attending that option school district.

The Norris School District continued to allow a sibling exception under its our policy until October 14, 1999, when it eliminated the sibling exception. The School District policy from then on provided that "Siblings will only be accepted into classes and special programs where enrollment is less than the capacity established by the Board of Education. . ." (Exhibit 3)

The Petitioners moved from the Respondent School District in the spring of 1998. The Petitioners assert that they relied on the policy regarding sibling exceptions that was in effect in 1998 when they made the decision to move from the District and did so to their detriment, in that

they may have made a different decision had they known that any future children would not be eligible to be enrolled in the Norris School District. In this regard, they do not assert that the District was not entitled to modify or change its policy, nor that anyone in the School District in any official capacity informed them that the sibling exception policy would remain unchanged in the future. They further assert that because the School District allowed its policy to remain intact for two years beyond the date on which the State eliminated the sibling exception from statute, that this reinforced their belief that the School District policy would still be in effect for them in the future. The Petitioners therefore assert that there should be some sort of a grandfather clause or provision applicable to them to allow them to enroll their child under the policy that was in effect at the time they moved from the District.

In essence, the Petitioners have asserted an argument based upon the general theory of equitable estoppel. The Nebraska Supreme Court has defined equitable estoppel in the following manner:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy. . . .
>
> Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the

> facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or person; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.

McElwee-Brown v. Omaha Transit Authority, 266 Neb. 317, 326, _____ N.W.2d _____. (2003).

Suffice to say, the Petitioners have not demonstrated the foregoing elements necessary to establish the doctrine of equitable estoppel. While the Petitioners did rely on their detriment to the policy then in place, they had no reasonable expectation or belief that that policy would or could not be changed in the future.

> There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal. . . .There is no constitutional right to have all general propositions of law once adopted remain unchanged. Every citizen in making his or her arrangements in reliance on the continued existence of laws takes on himself the risk of the laws being changed. . . .

16B Am. Jur. 2d Constitutional Law § 703, p. 199. In this regard, the Court in McElwee-Brown, supra, notes that "The doctrine of equitable estoppel will not be invoked against a government entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest

injustice." Id. at 326. As Petitioners acknowledge, the School Board has a right to change its policies.

There is also no corresponding right under the state option enrollment statutes to a grandfather provision, such as the Petitioners would have this Board impose in this case. That is purely a legislative policy decision on behalf of the school board making the change; whether or not it wishes at that time to also fashion a grandfather provision to preserve any existing rights afforded by the then existing policy. Such a policy determination is within the purview of the School District and is not required by the provisions of Neb. Rev. Stat. § 79-234 through § 79-241, nor any other requirements of law. It is an option the Norris School District Board of Education simply chose not to make when it eliminated the sibling exemption.

There is thus no basis for a determination that the procedures of Neb. Rev. Stat. § 79-234 through § 79-241 (Reissue 2003) or any other requirement of law were not followed by the 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 22nd day of July, 2004.

John M. Boehm

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 22, 2004, and a true and correct copy of the foregoing was served by first class United States Mail, postage prepaid, on July 22, 2004, to the following parties:

Gregory G. Rettele & Heidi L. Barry-Rettele
6801 Summerset Court
Lincoln, NE 68516

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

John M. Boehm

John M. Boehm, #15550, Hearing Officer