

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

NDE Case No. 08-07

On Behalf of

Petitioner,

v.

Hemingford Public Schools
911 Niobrara Street
P.O. Box 217
Hemingford, NE 69348

Respondent.

FINAL ORDER

COMES NOW the State Board of Education and for its Final Order in NDE Case No. 08-07 orders as follows:

1. That Respondent Hemingford Public Schools' decision to deny the Petitioner on behalf of application for option enrollment be affirmed; and
2. That the Hearing Officer's Findings of Fact and Conclusions of Law in all respects be adopted and made a part of this Order by reference to the same extent and like effect as if such Findings of Fact and Conclusions of Law were fully set forth verbatim in this Order.

Dated this 6th day of November 2008.

State Board of Education


Fred Meyer, State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 08-07, on November 6, 2008, was 6 in favor, _____ against, 1 abstaining, and 1 absent. Individual State Board members voted as follows:

IN FAVOR: F. Meyer, K. Imes, K. Winterer, J. Scheer, P. Timm, J. Higgins

AGAINST: _____

ABSTAINING: R. Evnen

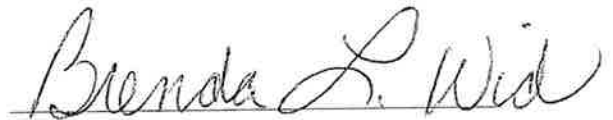
ABSENT: C. Woods Harris

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was hand-delivered to Margaret D. Worth, General Counsel, Nebraska Department of Education, 301 Centennial Mall South, PO Box 94933, Lincoln, NE, 68509, and served by first class United States Mail, postage prepaid, to the following parties, all on this 6th day of November 2008:

Michael Elsken
NE Advocacy Services, Inc.
134 S. 13th Street, Suite 600
Lincoln, NE 68508

Kelley Baker, Harding & Shultz
800 Lincoln Square
121 S. 13th Street, PO Box 82028
Lincoln, NE 68501



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Respondent.)

NDE Case No. 08-08

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

The Petitioner has filed these appeals pursuant to Neb. Rev. Stat. § 79-232, et seq.
(Reissue 2003) and Title 92, Nebraska Administrative Code, Chapter 61. Petitioner requests that

the State Board of Education reverse the Respondent School District's decisions disapproving the applications filed by the Petitioner to enroll children,

in Hemingford Public Schools for the 2008-2009 school year. The hearing on this matter was convened pursuant to notice at 10:09 a.m. on September 2, 2008 before John M. Boehm, Hearing Officer, appointed by the State Board of Education, in the Nebraska State Office Building, Sixth Floor, Computer Lab, Nebraska Department of Education, 301 Centennial Mall South, Lincoln, NE 68509, and by video conference link for the witnesses at ESU 13, 4215 Avenue I, Scottsbluff, Nebraska. The Petitioner was represented by attorney Michael J. Elsken, Nebraska Advocacy Services, 134 South 13th Street, Suite 600, Lincoln, NE 68508. Respondent was represented by Kelley Baker, Harding & Shultz, P.C., L.L.O., 800 Lincoln Square, 121 South 13th Street, P O Box 82028, Lincoln, NE 68501-2028. The hearing was recorded by General Reporting Service of Lincoln, Nebraska.

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 attorneys for the parties agreed on the record that the two appeals would be consolidated into one proceeding.

The parties jointly offered 12 exhibits which were received and include the following:

1. Application for student transfer for
2. MDT report for , Alliance Public Schools.
3. IEP for , Alliance Public Schools.
4. Application for student transfer for
5. MDT report for Alliance Public Schools.

6. IEP for Alliance Public Schools.
7. Hemingford Public Schools-District 10, Policy 502.02.
8. Option procedures, 2008.
9. Elementary resource schedule of Jeanette Chasek.
10. 2008-20009 school year schedule for Kelly Thompson.
11. List of students in the past two years.
12. Minutes of Board of Education for 1-14-08.

The Petitioner called the following witnesses,

and Mandy Plog, the Special Education Director for Hemingford Public Schools. The Respondent called Casper Ningen, Superintendent for Hemingford Public Schools. The Petitioner then called as a rebuttal witness Mandy Plog.

FINDINGS OF FACT

1. The Petitioner filed option enrollment applications for on April 16, 2008, to attend Hemingford Public Schools for the 2008-2009 year.
2. The Petitioner and the students reside in the Alliance school district and attended Alliance High School. The resident school district, Alliance Public Schools, waived the filing deadline date on April 22, 2008.
3. The Hemingford Public Schools District received the applications on April 30, 2008.
4. The applications were disapproved and rejected by Hemingford Public Schools on April 30, 2008, for the reason that the special education program was full.
5. Petitioner appealed the option enrollment application denials to the Nebraska State Board of Education on May 30, 2008.

6. _____ has been diagnosed with a health impairment based on a medical diagnosis of ADHD and qualifies for continuing special education services under the category of other health impairment.

7. _____ had most recently been enrolled at Alliance Public Schools in general education classes, but also participated in a special education resource room supplementary study hall which helped _____ stay on task and complete _____ assignments. _____ also received a supplementary math course and a supplementary English course through the resource room for a total of three periods. _____ is a sophomore this school year.

8. The Individual Education Program team from the Alliance Public Schools met on May 19, 2008, and proposed that _____ should participate in the general education environment and would also use special education services in the resource room for a supplementary English class and a supplementary study skills class for the 2008-2009 school year.

9. _____ was also identified as having a behavioral problem that involved both engaging in harassment of students and being harassed by other students. _____ had received two suspensions in the last year as a result of these incidents. This behavioral problem had resulted in _____ missing 21 days of school. As a consequence, a behavior intervention program was developed for _____. _____ has characterized the problem as one of other kids harassing and bullying _____ which forms part of _____ rationale for this proposed transfer, moving from a larger school to a smaller school.

10. _____ qualifies for special education services as a student with a medical diagnosis of asthma which qualifies _____ for special education services as a student with other health impairment. _____ asthma has affected _____ attendance at school which in turn required

assistance in keeping up with assignments and homework. asthma medications also had an impact on concentration and learning ability.

11. had most recently taken a supplementary English class in the resource room at Alliance Public Schools, along with a study hall class and a supplemental functional skills class. most recent Individual Education Program review of May 12, 2008, recommended that be educated in the general educational environment and participate in special education services in the resource room for an English class and a reading class for the 2008-2009 school year. is a junior this year

12. also expressed concerns about having similar problems involving harassment by other students which felt were related to the size of the school district was attending. While a behavior intervention program was listed as necessary for , the plan page for such program in the IEP was blank.

13. Mandy Plog is the Special Education Director for the Hemingford Public Schools and has served in this capacity for the last four years. At the time the option enrollment applications were made in April 2008, Ms. Plog had received copies of the drafts of the IEPs from and had reviewed them.

14. The most recent IEP for , which had been updated on May 19, 2008, indicates that would receive supplementary English and supplementary study skills which are resource classes with a 25% Special Education FTE requirement.

15. IEP of May 12, 2008, indicates that in the coming year would be taking English and reading in the resource room, also with a 25% Special Education FTE requirement. For each this results in an additional 460 minutes per week in the special education resource room taught by the resource teacher.

16. The Hemingford High School building is actually a 7th through 12th grade building. It houses a resource room with one full-time resource teacher for 7th through 12th grades. That teacher is Kelly Thompson. Kelly Thompson's schedule for the 2008-2009 school year involves between three and six students per period per day. Ms. Thompson works with students with a variety of needs, which includes one student that is there most of the day and who is nonverbal and has special health issues. His needs are more severe than that of the

children. There are also several students not listed on her schedule who drop in on an occasional or on an as needed basis and are thus in addition to the three to six students that she teaches daily.

17. If the children were added to Ms. Thompson's schedule, based on their most recent IEPs, Ms. Thompson would have both of the for two class periods each in her resource room every day. In case this would be an English class and a reading class in the resource room, and in situation it would involve an English class and a study skills class in the resource room, both of which would be in addition to her current schedule.

18. According to Ms. Plog and Mr. Ningen, adding the children to Ms. Thompson's current schedule would require the hiring of an additional para-educator in order to meet the education needs of all of the students who would be utilizing the resource room.

19. The addition of the would also require additional time on behalf of Ms. Thompson for meeting federal requirements for transitional planning. Likewise, the behavior intervention plans in place would also put an additional requirement on Ms. Thompson to make sure that these plans were followed, as well as requiring her to make the resource room available under those plans for cooling off periods at unscheduled times. This would further add to her current work load.

20. Hemingford Public Schools also has an additional resource teacher in a separate elementary building, Jeanette Chasek. She does not and has not worked with high school students. Ms. Chasek's schedule has increased over the last year due to some option students at the elementary level. Her caseload is such that if she received a student with significant needs it would also require the hiring of an additional para-educator. Also, the only way Ms. Chasek could accommodate either of the children would be for them to go to the elementary school building to meet their resource room requirements, which would conflict with the concept of the least restrictive environment.

21. Most of the special education students in the Hemingford high school program have less significant needs than the children, who would require two class periods per days. The current Hemingford high school special education students generally require one 50 minute block time period five days a week.

22. Ms. Plog recommended to Superintendent Ningen that the option enrollments applications be denied because of a lack of capacity due to Ms. Thompson's current case load and because the needs of each of the students in her classroom are so great that there would not be enough time to work with the without ignoring the needs of someone else already within the program. In the alternative it would require adding additional staff.

23. Casper Ningen is the school superintendent for the Hemingford Public Schools District. Mr. Ningen denied the applications of five other special education students in the year prior to the applications because the District also could not provide for those students special education needs due to lack of capacity. These five students would also have been in the Special Education Program for 2008-2009 had they been enrolled. In each case, as well as that of the accepting such students would have created a need for another para-educator.

24. At the present time, Hemingford Public Schools has two para-educators in the high school program both of which work with special education students. One of these para-educators works full-time with a nonverbal student who has special medical needs. The other para-educator assists with two students, including one who has a severe mental handicap with great academic needs. It is typical for at least one of the para-educators to be in the resource room during most of her periods.

25. The addition of more para-educators to work with special education students at the high school level further increases Ms. Thompson's work load because she has to plan and give information to them, and provide general supervision of them.

26. Hemingford Public Schools policies provide standards for option enrollment students that include the availability of special education programs operated by the District. Ms. Plog, the special education director, is responsible for reviewing option enrollment requests for special education so that she can make a recommendation to the superintendent. The Board has authorized Superintendent Ningen to act as their representative to sign on behalf of the District on all local, state and federal programs, which would include option enrollment applications.

CONCLUSIONS OF LAW

1. Petitioner perfected appeals 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.

2. Pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2003), the hearing shall determine whether the procedures of §§ 79-234 to 79-241 have been followed. The State Board of Education has also consistently maintained that it has the authority to determine whether Respondent's rejection of the Petitioner's applications complies with other requirements of law.

3. Neb. Rev. Stat. § 79-238 (2006 Supp.) 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 a lack of capacity based on available staff, facilities and projected enrollment.

4. The Respondent School District expressly stated that lack of capacity was the reason for its denial of these applications, i.e. “SPED program is full.”

5. 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. Tekolste v. Norris School District #160, NDE, Case No. 04-10 (2004); and 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.

6. The Board of Education has also taken the position that a district’s factual determination as to capacity, is 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).

7. On the other hand, where an action of a public body is within the scope of authority of such a 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 & Procedure, § 93(c) at 607-10. See also Hansen v. City of Norfolk, 201 Neb. 532, 267 N.W.2d 537, 541 (1978), and 56 Am. Jur. 2d Municipal Corporations, § 33 at 422.

8. Such rules are equally applicable to school board resolutions. See Richardson v. Braham, 125 Neb. 142, 145, 249 N.W. 557 (1933):

“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, 558 N.W.2d 807 (1997)

Robertson v. School District #17 of Lancaster County, 252 Neb. 103, 113, 560 N.W.2d 469 (1997). See also Galstan v. School District of Omaha, supra. Furthermore,

“An arbitrary action is one which is taken ‘in disregard of the facts and circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion’.”

Kolesnick, supra, at 583.

9. The Petitioner’s argument in regard to capacity is that the Respondent School District’s decision regarding capacity of its special education program should have allowed the addition of two additional students. The Petitioner has offered no specific evidence in this regard

to refute the District's contention. The District on the other hand has offered the uncontradicted testimony of its Special Education Director, Mandy Plog and its Superintendent Casper Ningen. They have discussed the current year's schedule for the single special education teacher assigned to the junior high/high school, as well as the schedule of the special education teacher assigned to the grade school. Their professional analysis and opinion is that the special education teacher assigned to the junior high/high school building could not handle the addition of two students with the special education requirements of the Petitioner's children without hiring an additional para-educator. In doing so, they explained the specific requirements of the special education teacher and the existing para-educators, as well as the needs of the present special education students enrolled in the junior high/high school. They also explained that the elementary special education teacher's schedule could also not presently meet the needs of the children, and that it would be inappropriate from the standpoint of the least restrictive alternative to attempt to meet the special education needs of the Petitioner's high school age children in the grade school building.

10. The Petitioner also argues that children are being harassed by students in their present school district and that a smaller school district would be better for them. Even if that contention is correct, it doesn't change the fact of lack of capacity, nor supercede that finding.

11. Given the evidence in the record in this case, and the burden of proof, there is no basis to support the claim of the Petitioner that applications should have been granted and no basis for concluding that the denial by the school district was either arbitrary or unreasonable as it was based on sound reasons and the actual capacity of the program.

12. Based upon the record before this Board, the decision of the Respondent School Board is not arbitrary and unreasonable. The Respondent's determination of lack of capacity is

supported by substantial and uncontroverted evidence. The Petitioner has not met the burden in this regard. 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 in its denial of these applications. Therefore, the determination of the Respondent School District in rejecting these applications for option enrollment of the Petitioner's children should be affirmed.

RECOMMENDATION

The following is recommended by the Hearing Officer:

1. That the Respondent School District's decision to deny the Petitioner's option enrollment applications 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 part of its order by reference to the same extent and like effect as if such Findings of Fact and Conclusions of Law were fully set forth verbatim in its order.

Dated this 14th day of October, 2008.



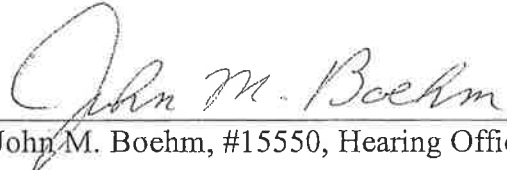
John M. Boehm, #15550
811 South 13th Street
Lincoln, NE 68508
(402) 475-0811
Hearing Officer

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, P O Box 94933, Lincoln, NE 68509 on October 14, 2008, and a true and correct copy of the foregoing was served by first class United States Mail, postage prepaid, on October 14, 2008, to the following parties:

Michael Elsken
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John M. Boehm, #15550, Hearing Officer