

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

)	
)	
)	CASE NO. 10-03
)	
Petitioners,)	
)	
v.)	FINAL ORDER
)	
Ft. Calhoun Community Schools)	
P O Box 430)	
Fort Calhoun, NE 68023)	
)	
Respondent.)	

Petitioners filed this appeal pursuant to Neb. Rev. Stat. § 79-232, et seq. (Reissue 2008) and Title 92, NAC, Chapter 61. Petitioners request that the State Board of Education reverse the Respondent School District's decision disapproving the application filed by the Petitioner to enroll their _____, in the Ft. Calhoun Community Schools for the 2010-2011 school year.

The hearing on this matter was convened, pursuant to notice, at 10:32 a.m. on May 25, 2010, before John M. Boehm, Hearing Officer, appointed by the State Board of Education, in the Nebraska State Office Building, Sixth Floor, Nebraska Department of Education, 301 Centennial Mall South, Lincoln, NE 68509. The Petitioners appeared pro se. The Respondent was represented by attorney, Kelley Baker. The hearing was recorded by General Reporting Services 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. The 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 2010-2011 school year pursuant Neb. Rev. Stat. §79-239 (Reissue 2008).
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 2008) 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 through §79-241 (Reissue 2008) and other applicable law, in rejecting Petitioners' application for their child to attend the Respondent School District for the 2010-2011 school year. Specifically, Respondent followed these procedures in rejecting the application because at the time the Respondent received the application for option enrollment for _____ was in fact subject to an IEP and receiving special education services from the Omaha Public School System despite the Petitioners' response on the option enrollment application in this regard. The Respondent denied the request the same day for lack of capacity in the special education program.

6. Petitioners' appeal is denied and Respondent's Board of Education's decision to deny the Petitioners' option enrollment application is affirmed.
7. The Hearing Officer's Findings of Fact and Conclusion 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 2nd day of September, 2010.

NEBRASKA STATE BOARD OF EDUCATION


Kandy Imes, President
State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 10-03, on September 2, 2010, was 7 in favor, _____ against, _____ abstaining, and 1 absent.

Individual State Board members voted as follows:

IN FAVOR: K. IMES, J. SCHEER, R. EVNEN, M. QUANDAHL, P. TIMM, F. MEYER, J. HIGGINS

AGAINST: _____

ABSTAINING: _____

ABSENT: R. VALDEZ

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon _____ ; Kelley Baker, Attorney at Law, P O Box 82028, Lincoln, NE 68501-2028; and, Jerry Beach, Superintendent, Ft. Calhoun Community Schools, P O Box 430, Fort Calhoun, NE 68023; via United States Mail, first class postage prepaid and hand delivered to Margaret Worth, General Counsel, Nebraska Department of Education, 301 Centennial Mall South, 6th floor, Lincoln, NE, on this 2nd day of September, 2010.


Brenda L. Wid

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA



NDE Case No. 10-03

Petitioners,

v.

Ft. Calhoun Community Schools
P.O. Box 430
Fort Calhoun, NE 68023

Respondent.

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

Petitioners have filed this appeal pursuant to Neb. Rev. Stat. § 79-232, et seq. (Reissue 2008) and Title 92, Nebraska Administrative Code, Chapter 61. Petitioners request that the State Board of Education reverse the Respondent School District's decision disapproving the option enrollment application filed by Petitioners to enroll their _____, in the Ft. Calhoun Community Schools for the 2010/2011 school year.

The hearing on this matter was convened, pursuant to notice, at 10:32 a.m. on May 25, 2010, before John M. Boehm, Hearing Officer, appointed by the State Board of Education, in the State Board Room, Nebraska Department of Education, Sixth Floor, State Office Building, 301 Centennial Mall South, Lincoln, Nebraska. Petitioners appeared pro se. The Respondent, Ft. Calhoun Community Schools, was represented by attorney Kelley Baker, 121 South 13th Street, #800, 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 Department of Education Rules of Practice and Procedure for hearings in contested cases before the

Department of Education, Title 92, NAC, Chapter 61. Petitioners, _____, testified on their own behalf and were cross-examined by Respondent's counsel. Dr. Jerry Beach, Superintendent of Schools for Ft. Calhoun Community Schools, testified on behalf of the Respondent. The Petitioners introduced eight exhibits: (1) E-mails dated February 24, 2010; (2) Letter from Jerry Beach dated February 26, 2010; (3) E-mails dated March 2, 2010; (4) E-mail dated March 3, 2010; (5) E-mail dated March 8, 2010; (6) E-mail dated March 8, 2010; (7) Application for Student Transfer; (8) Letter from Jerry Beach dated February 26, 2010. The Respondent offered three exhibits: (9) Nonresident Students/Option Enrollment Policy; (10) Regular School Board meeting minutes dated February 8, 2010; (11) Fax from _____ dated March 8, 2010. All exhibits were entered into the record without objection. A transcript of the hearing is attached.

FINDINGS OF FACT

1. Petitioners reside in the Omaha School District where their _____, attended Hale Middle School, this last school year.
2. Petitioners filed an application for student transfer for their _____ under the option enrollment program for the 2010/2011 school year with Ft. Calhoun Community Schools on February 26, 2010. On the application, the Petitioners answered the question "Does the student require special education services?" with a no answer.
3. Petitioners' _____ had been receiving special education services pursuant to an IEP beginning in third grade. At the beginning of the 2009/2010 school year, at _____ IEP meeting, the Petitioners asked that _____ be released from the program. They were told no and that _____ would be receiving certain extra services. Petitioners did not see any extra services being provided to their _____ and inquired again in December as to what was being done for _____.

At that time [redacted] was holding a C average. At the end of the school year [redacted] was receiving primarily As and Bs. Toward the end of the school year, [redacted] talked again to OPS officials about taking [redacted] out of special education.

4. The option enrollment transfer application was signed by [redacted] on February 24, 2010.

5. [redacted] had sent an e-mail to Briana Bridgeford at Hale Middle School inquiring as to the process to take [redacted] out of special services. [redacted] received an e-mail reply from Ms. Bridgeford dated February 24, 2010 stating that [redacted] need to contact her supervisor, David Lisko, who would then contact [redacted] regarding an IEP meeting to end services for [redacted]. [redacted] stated [redacted] concern about the release of [redacted] from special services as it related to the pending option enrollment application with Ft. Calhoun Schools.

6. [redacted] again contacted Ms. Bridgeford by e-mail indicating [redacted] had not heard anything further regarding [redacted] release. Ms. Bridgeford replied by e-mail on March 2, 2010, providing direct contact information for David Lisko.

7. On March 3, 2010, Wesley Dacus, Dean of Students at Hale Middle School, e-mailed [redacted] stating that he had forwarded [redacted] concerns to David Lisko, the OPS Special Education Supervisor and urged [redacted] to contact Mr. Lisko directly.

8. [redacted] then had contacted Mr. Lisko by e-mail, and he responded by e-mail on March 8, 2010, directing [redacted] to drop off a letter at Hale Middle School requesting that [redacted] no longer receive special education services and he would take care of the OPS records. [redacted] had again expressed concern about the release of [redacted] due to the option enrollment application, which had been denied.

9. [redacted] then faxed to Hale Middle School the requested letter and Mr. Lisko responded by e-mail dated March 8, 2010 that [redacted] special education services file will show in the OPS system as ending on March 8, 2010.

10. At the time the option enrollment application was submitted, [redacted] did have an IEP in place. [redacted] checked that [redacted] was not receiving special education services, because [redacted] felt that [redacted] wasn't actually receiving any services from OPS at that time, and that they had been working on having [redacted] dismissed from the program. [redacted] had a "go pass" allowing [redacted] to go to a counselor if [redacted] was stressed, but had not used it.

11. No testing or evaluation was done by OPS that resulted in [redacted] being released from the program. It was done solely on parental request.

12. Dr. Jerry Beach is the Superintendent of Schools for Ft. Calhoun Community Schools. He has served in that capacity for seven years. He has oversight for all activities in the district including special services and the option enrollment program.

13. When option enrollment applications are received, they are forwarded to him for review and a determination.

14. Dr. Beach testified that it is his protocol in the case of option enrollment students to contact the resident school district to determine if the information reflected on the application is accurate and whether or not they are receiving any special education services. On the date of the receipt of the application for [redacted] February 26, 2010, contact was made with the Omaha Public Schools which indicated that [redacted] was in special education and had an active IEP. This also occurred on February 26, 2010. The application was then denied that same day and a letter dated February 26, 2010, was sent to the Petitioners which stated that [redacted] application had been denied because the Ft. Calhoun special education program was at capacity.

His letter also stated that a call had been made to the Omaha Public Schools offices which indicated that [redacted] qualified for special education services.

15. On that same day, February 26, 2010, an option enrollment request was also received for [redacted] application was approved on that same day and a letter was sent to the Petitioners dated February 26, 2010, stating that [redacted] application had been approved.

16. Ft. Calhoun Public Schools had adopted an option enrollment policy which was revised as of December 14, 2009. At a District Board meeting on February 8, 2010, the Board voted to approve the option enrollment capacities for the 2010/2011 school year. Pursuant to that document, the special education program was at capacity whereas all grades other than sixth and tenth had openings available for option enrollment.

17. [redacted] was accepted because an option enrollment opening was available for the seventh grade pursuant to the Board's determination, whereas [redacted] application was denied because the special education programs for grades 7 through 12 were at capacity.

18. According to Dr. Beach, it would not be appropriate to remove a student with an active IEP from special services solely for the purpose of an option enrollment. The District would have an obligation to that student and determine if additional services were required given [redacted] circumstances. If it were determined that additional services were required, this would place stress on a school already at capacity. In order to add additional students enrolled in special education services, the District may have had to add additional staff. Adding additional students beyond capacity would be a disservice to all of the students in the program.

19. Petitioners wanted to enroll their son [redacted] at Ft. Calhoun Schools because it is a smaller school with smaller class sizes, and a more comfortable social setting for the students.

20. On March 8, 2010, [redacted] faxed a note to Ft. Calhoun Schools along with a copy of the OPS notice of discontinuation of placement in special education, also dated March 8, 2010. [redacted] asked whether an additional transfer request needed to be submitted.

CONCLUSIONS OF LAW

1. Petitioners perfected their appeal to the State of Board in a timely fashion and pursuant to Neb. Rev. Stat. § 39-239 (Reissue 2008). The State Board of Education has jurisdiction over this matter and the parties thereto.
2. Pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2008), a hearing shall determine whether the procedures of §§ 79-234 through 79-241 have been followed. The State Board of Education has consistently maintained that it has the ability to determine whether Respondent's rejection of Petitioners' application complies with other requirements of law.
3. Neb. Rev. Stat. § 79-238 (Reissue 2008), 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 protected enrollment.
4. At the time the school district received the application for option enrollment for [redacted] was in fact subject to an IEP and receiving special education services from the Omaha Public School System despite the parents' response on the open enrollment application in this regard. Likewise, the request was denied that same day for lack of capacity in the special education program as specifically set forth in the denial and cover letter addressed to the Petitioners and dated February 26, 2010.
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 application. See Tekolste v. Norris School District, #160, NDE Case No. 04-10 (2004); and Enrollment Option Appeals, Lancaster County School District #001, aka 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 a factual determination by a school board cannot be upheld if it is unreasonable or arbitrary. Langin v. Chase County School District, #0003, aka 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, such body has the 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, 267 N.W.2d 537, 541 (1978) and 56 Am. Jur.2d Municipal Corporations, § 33 at 422. Each such rules are equally applicable to school board resolutions. See Richardson v. Brahm, 125, 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 principals.

Likewise,

If a school board acts within the power conferred upon it by the Legislator, 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*. In addition,

An arbitrary action is one which is taken “in disregard to 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.

8. The Petitioners did not challenge the capacity determination and thus offered no evidence to refute the District’s determination as to capacity.

9. The option enrollment application for _____ was submitted on February 24, 2010, at a time when _____ was subject to an IEP and receiving special education services through OPS. The application was in turned denied on February 26, 2010, based upon the fact that the student was still subject to special education services. The student was not in fact released from special education services by OPS until March 8, 2010. Such release was done based solely on the parents’ request and without any testing or evaluation of the student and a review of _____ IEP. Removal of the student from special education was a significant factor in the option enrollment request.

10. While the option enrollment application process remained open until March 15, the Petitioners did not submit a new application for _____ or make a request for the District to reconsider its denial. The only action taken by the Petitioners was a faxed memo to the school district indicating that _____ had been withdrawn from special education on March 8, 2010, and which asked whether a new application was required. There was not a reply to this memo. The Petitioners acted prematurely in submitting their application for _____ prior to _____ being

released from special education services, and in doing so deliberately, incorrectly listed status on the application form. The Option Enrollment Application was certainly a motivating factor in the request to release the student from special services.

11. The option enrollment district has the responsibility to provide the services actually needed by an option enrollment student, including special education services. Given the fact that this particular student had an existing IEP until shortly after denial of the option enrollment request, and the basis for release from special services was based only upon a parental request, the option enrollment district would have to evaluate this student to determine actual needs, including special services. Given that special services was already at capacity and the likely possibility this student would require special services, the Board's action was not arbitrary or unreasonable, given the facts at the time of the denial and the fact that the parents did not file a new application or a request for a redetermination.

12. The option enrollment statutes do not provide that the Petitioners could submit two applications for the same student for the same year within the application time frame. Nevertheless, that was not done in this case. The memorandum dated March 8, 2010, is not an application. Moreover, there is no basis in statute for a reconsideration by the school district of an option enrollment decision but prior to the final submission deadline of March 15. The school district would have had no statutory basis for reconsidering its original denial which was correct based on the facts at the time of the denial.

13. There is no basis for a determination that the procedures of Neb. Rev. Stat. §§ 79-234 through 79-241 (Reissue 2008), nor any other requirements of law, were not followed by the respondent school district in its denial of this application, nor that this denial was arbitrary or

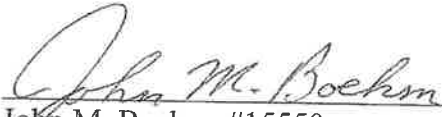
unreasonable. Therefore, the determination of the respondent school district in rejecting this application for option enrollment should be affirmed.

RECOMMENDATION

The following is recommended by the Hearing Officer:

1. That the Respondent School District'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 part of its order by reference to the same extent and like effect as if such findings of facts and conclusions of law were fully set forth verbatim in its order.

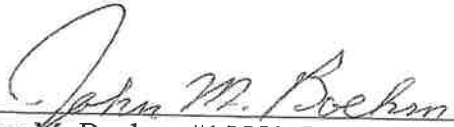
Dated this 5th day of August, 2010.


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, and a true and correct copy of the foregoing was served by first class United States Mail, postage prepaid, on August 5, 2010, to the following parties:

Kelley Baker
Attorney at Law
P O Box 82028
Lincoln, NE 68501-2028


John M. Boehm, #15550, Hearing Officer