

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

)	
)	
)	CASE NO. 10-04
)	
Petitioner,)	
)	
v.)	FINAL ORDER
)	
Ft. Calhoun Community Schools)	
P O Box 430)	
Fort Calhoun, NE 68023)	
)	
Respondent.)	

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

The hearing on this matter was convened, pursuant to notice, at 11:45 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 Petitioner's 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 Petitioner 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 Petitioner's 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 Petitioner's application for 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. Petitioner's appeal is denied and Respondent's Board of Education 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. 10-04, 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. Wild

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

)	NDE Case No. 10-04
)	
)	
)	
Petitioner,)	
)	
v.)	HEARING OFFICER'S PROPOSED
)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW AND RECOMMENDATION
Ft. Calhoun Community Schools)	
P.O. Box 430)	
Fort Calhoun, NE 68023)	
)	
Respondent.)	

INTRODUCTION

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

The hearing on this matter was convened, pursuant to notice, at 11:45 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. Petitioner 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. testified on behalf of the application for and was cross-examined by Respondent's counsel. Petitioner, also testified on behalf of the application and was cross-examined by Respondent's counsel. Dr. Jerry Beach, Superintendent of Schools for Ft. Calhoun Community Schools, testified on behalf of the Respondent. The Petitioner introduced three exhibits: (1) Sixth grade report card; (2) Letter from Kathleen Eby dated May 17, 2010; and (3) Letter from and dated March 17, 2010, and attached Notice of Discontinuation. The Respondent also offered three exhibits: (4) Nonresident Students/Option Enrollment Policy; (5) Regular School Board meeting minutes dated February 8, 2010; and (6) Application for Student Transfer. All exhibits were entered into the record without objection. A transcript of the hearing is attached.

FINDINGS OF FACT

1. are the parents of . They are presently residents of the Omaha Public School District. is ready to enter the seventh grade. would like daughter to be in a smaller school with more teacher/student contact. describes his daughter as passive and vulnerable.

2. An application for option enrollment on behalf of was filed by on February 24, 2010, to transfer from the OPS system to Ft. Calhoun Community Schools.

3. was enrolled and receiving special education services while at OPS. was originally enrolled in special education services while in second grade, and received resources in the area of reading, language arts and speech/language. has most recently received services from both a resource teacher and a speech language pathologist.

4. Since fifth grade has been in a “monitor status” regarding reading and language arts, and was seen only by the resource teacher when requested by a classroom teacher. was still receiving speech/language therapy in her regular classroom.

5. In February, 2010, asked resource teacher at Florence Elementary School about being dismissed from special services. One of the reasons for this request was the desire to transfer to Ft. Calhoun Community Schools. parents also believed grades had significantly improved and that no longer needed the limited special services received. was subject to an IEP and had not been released from special services at the time application was submitted on February 24, 2010.

6. Dr. Jerry Beach is the Superintendent of Schools for Ft. Calhoun Community Schools and has served in that capacity for seven years. As part of his responsibilities as Superintendent, he has responsibility for special education and for option enrollment applications. When an application is received, he reviews it and makes recommendations.

7. The option enrollment application for for the 2010/2011 school year was received by Ft. Calhoun Community Schools on February 24, 2010. The application indicated that was receiving receive special education services. In the response to having an IEP, the application was checked no. Dr. Beach believed that was in error and not consistent with special education requirements. As part of his office protocol to verify and insure whether a student is receiving services as required, he had his office assistant call the resident school district to determine if the student was receiving special education services. OPS confirmed that had an active IEP and the areas in which received services were speech, language and learning disability.

8. The District Board had set its enrollment capacities at its February 8, 2010, board meeting. At that time the board determined that the special education program was at capacity. In accordance with that policy, on February 24, 2010, the date of receipt of the option enrollment application for _____, Dr. Beach denied the same.

9. The option enrollment capacity standards as adopted by the school board were based on a number of factors including the number of existing students, the availability of staffing and the availability of facilities, materials and supplies.

10. On May 17, 2010, Kathleen Eby, _____ resource teacher at Florence School, drafted a letter describing _____ participation in special education services and in particular “monitor status” in regard to reading and language arts. While this letter stated that both Ms. Eby and _____ special language pathologist, Dani Marquiss, had no reservations about being dismissed from special education services for the upcoming school year, the letter contains no indication that such a dismissal had been made. The letter was never received by Dr. Beach.

11. _____ had been dismissed by OPS from placement in special education based upon parental request effective March 3, 2010. This Notice of Discontinuation was dated March 2, 2010. A letter was sent to the Nebraska Department of Education addressed to a “Mr. Embody” along with a cover letter dated March 17, 2010, from the parents of _____, and was stamped as received on March 25, 2010. This letter and notice was not submitted to Ft. Calhoun Community Schools. The letter is Petitioner’s appeal to the State Board of Education.

12. Part of the reason for the request for the discontinuation of special services was to allow _____ to transfer via option enrollment to Ft. Calhoun Community Schools. The parents also believed _____ grades had improved from the prior year and _____ no longer needed the limited range of services being provided.

CONCLUSIONS OF LAW

1. Petitioner perfected 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 Petitioner's 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 projected enrollment.
4. At the time the school district received the application for option enrollment for February 24, 2010, was in fact subject to an IEP and receiving special education services from the Omaha Public School System despite the parent's response on the open enrollment application in this regard. Likewise, the application was denied that same day for lack of capacity in the special education program as specifically set forth in the denial and the cover letter addressed to the Petitioner and dated February 24, 2010.
5. The State Board of Education has consistently held in such appeals that in order for the petitioner to prevail, she has 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 its 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. 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 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*. 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 Petitioner 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 turn denied on February 24, 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 3, 2010. Such release was done based solely on the parent’s 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. There was no indication that a copy of the dismissal of _____ from special services was ever submitted to Ft. Calhoun Public Schools during the remainder of the option enrollment process. A copy of this dismissal was sent to the Nebraska Department of Education on March 17, 2010, as part of the appeal to the State Board of Education. The Petitioner acted prematurely in submitting _____ application for _____ prior to _____ being released from special education 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 that the basis for release from special services was based primarily upon parental request, the option enrollment district would have had to evaluate this student to determine actual needs, including special services. Given that special services were already at capacity and the likely possibility that this student would require special services, the Board's action was not arbitrary or unreasonable, particularly given the facts known at the time of the denial, and also the fact that the parents did not file a new application or a request for a redetermination with the Respondent. Perhaps most important, is the fact that the District was unaware of the subsequent removal of from the special services program by OPS. The option enrollment district's denial was correct based upon the facts before it at the time of the denial. There was no notice of any change of factual circumstances presented to the option enrollment district.

12. The option enrollment statutes do not provide that a Petitioner can 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 letter dated March 17, 2010, to the Department of Education, is not an application, and was in any event submitted after the March 15th option enrollment deadline. It was not sent to the school district. It was Petitioner's appeal from the denial. Moreover, there is no basis in statute for a reconsideration by the school district of an option enrollment decision prior to the final submission deadline of March 15, let alone any factual basis on which the district could have acted. The school district thus would have had no

statutory or factual 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 Petitioner's 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 11th day of August, 2010.



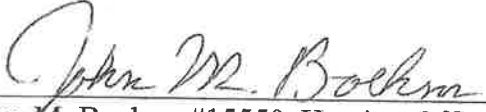
John M. Boehm, #15550
811 South 13th Street
Lincoln, NE 68508
(402) 475-0811
Hearing Officer

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 11, 2010, to the following parties:

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



John M. Boehm, #15550, Hearing Officer