

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

)	
)	
)	CASE NO. 16-01
)	
Petitioners,)	
)	
v.)	FINAL ORDER
)	
PIERCE PUBLIC SCHOOLS)	
201 N. Sunset Street)	
Pierce, NE 68767)	
)	
Respondent.)	

Petitioner filed this appeal pursuant to Neb. Rev. Stat. § 79-239 (R.R.S. 2014) and Title 92, NAC, Chapter 61, effective October 1, 1997. Petitioner requests that the State Board of Education reverse the Respondent School District's decision to deny Petitioner's application to option enroll their child, _____ in the Pierce Public Schools for the 2016-2017 school year.

The Parties in this case, by way of joint statements filed with the pleadings, waived an in-person hearing. Instead, the parties submitted the case to the assigned hearing officer on stipulated facts, exhibits and briefs.

The State Board of Education, having considered the record in the case and the Hearing Officer's Proposed Findings of Fact, Recommended Conclusions of Law and Recommended Decision, 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 and Decision, the Hearing Officer's Findings of Fact and Conclusions of Law and Recommended Decision.

WHEREFORE, the Nebraska State Board of Education orders as follows:

1. The Hearing Officer's Proposed Findings of Fact, Recommended Conclusion of Law and Recommended Decision 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, Conclusions of Law and Decision were fully set forth verbatim herein.
2. Respondent Pierce Public Schools' decision to deny the Petitioners' option enrollment application is affirmed.

Dated this 3rd day of June, 2016.

NEBRASKA STATE BOARD OF EDUCATION

Handwritten signature of Rachel Wise in cursive script, written over a horizontal line.

Dr. Rachel Wise, President
State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 16-01 on June 3, 2016 was 5 in favor, _____ against, 1 abstaining, and 2 absent.

Individual State Board members voted as follows:

IN FAVOR: L.LARSEN, G. FLINT, J. WITZEL, P. TIMM, P.McPHERSON

AGAINST: _____

ABSTAINING: R. WISE

ABSENT: M. NICKELS, M O'HOLLERAN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon _____ and Pierce Public Schools, 201 N. Sunset Street, Pierce, NE 68767; via United States Mail, certified mail return receipt requested and hand delivered to Scott Summers, Legal Counsel III, Nebraska Department of Education, 301 Centennial Mall South, 6th floor, Lincoln, NE, on this 3rd day of June, 2016.

Brenda L. Wild

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

CASE NO. 16 - 01

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)	
Petitioners,)	HEARING OFFICER'S PROPOSED
v.)	FINDINGS OF FACT, RECOMMENDED
)	CONCLUSIONS OF LAW AND
PIERCE PUBLIC SCHOOLS)	RECOMMENDED DECISION
201 N. Sunset Street)	
Pierce, NE 68767)	
)	
Respondent.)	

INTRODUCTION

Petitioners have filed this appeal, pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2014), 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 Petitioners to enroll their _____ in the Pierce Public School District for the 2016-17 school year. The parties have by Joint Statement, filed with the pleadings in this matter, waived an in-person hearing and are submitting the matter on stipulated facts, exhibits and briefs to the Hearing Officer, Jim R. Titus, appointed by the State Board of Education.

A Stipulation of Facts and fourteen numbered exhibits were offered and received without objection, namely, unmarked, the Stipulation of Facts; Exhibit 1, Nebraska Department of Education Rule 19; Exhibit 2, Nebraska Department of Education Rule 51; Exhibit 3, Pierce Board of Education Policy Number 5004; Exhibit 4, Pierce Board of Education Policy Number 6010; Exhibit 5, Contract time for Speech Pathologist Services; Exhibit 6, Contract and bill from PT; Exhibit 7, Contract and billing from ESU 8; Exhibit 8, Option enrollment application denial; Exhibit 9, _____ letter to Steffensen dated 12/11/15; Exhibit 10, Response letter to _____ from Steffensen dated 12/22/15; Exhibit 11, _____ journal notes titled _____ Option Enrollment dated October 2015 to December 15, 2015; Exhibit 12, _____ IEP; Exhibit 13 Paraprofessional Advertisements ran for the 2015-2016 school year; and Exhibit 14, Information from the NDE State of the Schools Report.

Having considered the stipulation of facts, exhibits and briefs provided by the parties, the Hearing Officer makes the following proposed findings of fact, recommended conclusions of law and recommended decision.

PROPOSED FINDINGS OF FACT

1. _____ are the parents of _____.
2. Pierce Public Schools is a school district as defined by Neb. Rev. Stat. § 79-101(1).
3. Pierce Public Schools operates a preschool that serves children who are residents of the Pierce School District and who reside within the boundaries of other school districts.
4. Under Nebraska law, preschool students are not covered by the compulsory attendance (Neb. Rev. Stat. § 79-201 through § 79-210) or option enrollment (Neb. Rev. Stat. § 79-232 through § 79-246) statutes.
5. The Pierce Public Schools receives on average a 56% reimbursement of its total yearly special education costs from the State of Nebraska. The Pierce Public Schools receives yearly, federal dollars that can be used to cover unreimbursed special education costs. The Pierce Board of Education has elected to use these federal dollars to help fund its early childhood education program, which is an election permitted by state and federal law. This federal dollar amount and its percent of its unreimbursed special education costs is unknown by the Pierce Public School Administration and its Board of Education.
6. Students with disabilities who have been verified by a multi-disciplinary team as qualifying for special education services must receive a free-appropriate public education from their local education agency (LEA). The LEA must provide services to special education students through an individualized education plan (IEP) which is adopted through a highly structured process set forth in Rule 51 of the Nebraska Department of Education. If a service or support is called for by a student's IEP, the LEA must provide those services, regardless of the cost of those services or the resources of the LEA. A student's IEP can only be changed by the student's IEP team, which consists of parents and general education, special education, and administrative staff. Even if parents wish to change the services that their disabled child will receive, those changes are prohibited unless they are adopted by the child's IEP team as a whole. IEPs must be reviewed and updated at least annually. (Exhibit 2).

7. Educational Service Units in the State of Nebraska are political subdivisions that serve as intermediate service agencies for local school districts. Pierce Public Schools is a member of Educational Service Unit No. 8 (ESU 8). ESU 8 provides specialized services to Pierce pursuant to a services contract which charges Pierce on an hourly basis for professional services provided to students by ESU 8 staff.

8. From August 12, 2015 through December 21, 2015, _____ was enrolled in the Pierce Public School District as a resident preschool student.

9. Preschool students at Pierce attend school from 8:00 - 11:30 a.m. four days per week.

10. Beginning on December 1, 2015, _____ became residents of the Plainview School District. The Plainview School District began providing educational services to _____ on December 21, 2015. The Plainview Preschool facility is at capacity with a waiting list and therefore could not allow _____ to begin attending preschool immediately. The Plainview School District arranged for _____ to continue attending the Pierce School District Preschool with Plainview providing all specialized instruction and supports. The supports provided by Plainview during the 2015-16 school year include, but are not limited to, speech therapy services, occupational therapy services, physical therapy services and a 1:1 paraeducator. These supports are all provided by Plainview with Plainview staff or contracted serviced providers.

11. At the end of the 2014-15 school year, two of the paraeducators employed by the Pierce School District resigned to accept other employment. The school district advertised for several months seeking to hire replacements for these employees. (Exhibit13). Pierce was unsuccessful in filling these positions.

12. When _____ was attending the Pierce Preschool, _____ was served by a 1:1 paraeducator employed by the Pierce School District. The paraeducator served _____ in the mornings and then traveled to the high school to serve other students there.

13. After _____ became a resident of Plainview, the paraeducator who was serving _____ was reassigned to the high school to fill part of the duties of the two vacant paraeducator positions.

14. Kindergarten students in Pierce Elementary School attend school for the entire school day, five days per week. The paraeducator who was assigned to work with _____ when

was a resident of Pierce will not have time available in her schedule to serve next school year.

15. While was attending the Pierce School District, Pierce contracted with independent contractors to provide physical and occupational therapy services for After moved out of the Pierce School District, Pierce terminated its contract with those independent contractors for those services. (Exhibits 5, 6 and 7).

16. were residents in the Pierce Public School District for the past 22 years through the beginning of the 2015-16 school year.

17. During the first semester of the 2015-16 school year, moved their residence from Pierce Public School District to the Plainview Public School District.

18. is a teacher employed by the Pierce Public Schools for the 2015-16 year and plans to continue to teach with the Pierce School District in 2016-17.

19. In late September, 2015, Pierce School Superintendent Kendal Steffensen (Steffensen) and began to discuss the move out of the District.

20. In late September– early October, 2015, stopped by Steffensen’s office and asked if the school district provides transportation to non-resident students. Steffensen replied that the district does, provided that (1) the family’s resident is not too far from already established bus routes and (2) the non-resident families pay a charge of \$1 per additional mile traveled. Steffensen inquired as to why was asking about non-resident transportation. At that point, informed Steffensen that his family was moving out of the district and that was exploring whether the district would provide transportation to children. Later, during the 2nd period of the District school day, Steffensen realized that: was going to attempt to option enroll that is a special education student; and that the Pierce special education elementary school program is at capacity. Steffensen then went to classroom and told that the District has a policy that if a family want to option enroll a child and that child qualifies for special services, then the District will deny them enrollment. He then gave an example of a family who currently have children enrolled in the District and they tried to option enroll another child who qualifies for special education and the District denied them. When asked if the District handles these cases on a case-by-case basis, Steffensen said no, that the District cannot do that.

21. In early November, 2015, spoke with Steffensen about option enrolling

into the District. On or near December 3, 2015, [redacted] went to Steffensen's office and asked for an option enrollment application.

22. Because the option enrollment language in the policy seemed inconsistent with the option enrollment decision-making process described by Steffensen, [redacted] decided to discuss the process with District Board Member, Dan Unseld and District Board President, Ted Krienke.

23. On Friday, December 4, 2015, during [redacted] discussion with Ted Krienke, Krienke stated that the district could not allow [redacted] to attend as an option student. Mr. Krienke stated that it would be inconsistent with policy and past practice for the district to allow [redacted] to attend as an option student. Mr. Krienke went on to say that there was another family that had submitted an application for option enrollment for a special education student and that the application of that student had been denied because the Pierce special education program is at capacity. Mr. Krienke expressed concern that if the district allowed [redacted] to option enroll even though the special education was at capacity, the other student whose application was denied could sue the district.

24. On Friday, December 4, 2015, [redacted] submitted an option enrollment application to the District for the 2016-17 school year for their [redacted]. On the same date, the [redacted] submitted an option enrollment application for [redacted] their second grade [redacted] Pierce [redacted] approved the option application for the [redacted]. Both applications were made and returned on the same date.

25. On Thursday, December 10, 2015, this same option enrollment application was returned to [redacted] in [redacted] District mailbox marked by Steffensen, "Denied" with the reason for denial, "Special Education Program is at capacity."

26. On December 11, 2015, [redacted] sent a certified letter to Steffensen asking for the "specific standards adopted by the Pierce Board of Education that were used to reject the option application for [redacted] dated December 4, 2015, and to please provide in writing the capacity numbers of option students the Pierce District set for the programs, class, grade level or school building that [redacted] would have been enrolled in and/or provide [redacted] in writing any school board resolution that declare the program, class or school unavailable to option students due to lack of capacity." (Exhibit 10).

27. On Monday, December 21, 2015, [redacted] IEP team met to develop an IEP for [redacted]

In attendance were Steffensen, Mr. Richard Alt, the Plainview District Superintendent; Mr. Adam Patrick, the Pierce Elementary School Principal; Kyle Simmons, a speech pathologist employed by the Pierce School District; Ruth Miller, Special Education Coordinator from Educational Service Unit #8; Vicky Bartak, ESU 8 early childhood coordinator; Mrs. Ashley Wright, current preschool teacher and the In the EIP meeting, Steffensen asked Simmons what his caseload was.

28. Immediately following this IEP meeting, the had a discussion where they agreed that was developing to a point where a one-on-one school aide would not be necessary.

29. current IEP calls for to have a 1:1 paraeducator, speech services, physical and occupational therapy, and social skills training, among other specialized services. (Exhibit 13).

30. The Pierce Elementary School employs two certificated teachers and four paraeducators.

31. The Pierce School District employs a single speech therapist.

32. The Pierce School District does not employ a physical therapist or an occupational therapist. When students who are enrolled in the Pierce School District require these services pursuant to their individualized education plans, Pierce contracts for those services with independent contractors. Pierce pays the independent contractor additional fees for all contracted service provider hours rendered by contracted staff to Pierce students.

33. The Pierce School District does not employ an early childhood specialist, a school psychologist, or a special education administrator. Pierce pays ESU 8 additional fees for all contracted service provider hours rendered by ESU #8 staff to and on behalf of Pierce students.

34. On Tuesday, December 22, 2015, Steffensen responded to the certified letter with a letter that states in part “please find a copy of the Pierce Public School’s Board of Education Policy 5004 Option Enrollment” (Exhibit 4) and that the District has “determined that accepting as an option student would cause overcrowding in (the District’s) special education program and would significantly increase the operating costs of the District.” (Exhibit 11). In that letter Steffensen reported that the Pierce Elementary School Special Education program has a projected caseload for 2016-17 of 44 students. Steffensen also stated that the projected caseload for speech therapy program for 2016-17 is 60 students. (Exhibit 11).

35. On January 8, 2015, [redacted] filed a petition for review with the Nebraska State Board of Education in accordance with Title 92, Chapter 61 of the Nebraska Administrative Code.

36. On February 5, 2016, the District filed an answer with the Nebraska State Board of Education in accordance with Title 92, Chapter 61 of the Nebraska Administrative Code.

37. Posted on the office District web site dated January 15, 2016, is the following, "Pre-Registration for the 2016-2017 preschool and kindergarten classes is now under way at Pierce Elementary School."

38. According to the State of the Schools Report published by the Nebraska Department of Education, the Pierce School District has a higher number of students identified as eligible to receive special education services than the statewide average. According to that same data, Pierce has significantly lower mobility among its student population than the statewide averages for mobile and very mobile student populations. (Exhibit 14.).

RECOMMENDED CONCLUSIONS OF LAW

39. Petitioners perfected their appeal to the State Board of Education in a timely fashion and pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2014). The State Board of Education has jurisdiction over this matter and the parties thereto.

40. Pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2014), the hearing on appeal shall determine whether the procedures of Neb. Rev. Stat. §§ 79-234 to 79-241 have been followed.

41. Neb. Rev. Stat. § 79-238 (1) (Reissue 2014) provides in part as follows:

"(1) Except as provided in this section, and sections 79-235.01 and 79-240, the school board of the option school district shall adopt by resolution specific standards for acceptance and rejection of applications and for providing transportation for option students. 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 school district. For a school district that is not a member of a learning community, 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 school district will contract based on existing contractual arrangements, and availability of appropriate special education programs. To facilitate option enrollment within a learning community, member school districts shall annually (a) establish and report a maximum capacity for each school building under such district's control pursuant to procedures, criteria, and deadlines established by the learning community coordinating council and (b) provide a copy of the standards for acceptance and rejection of applications and transportation policies for option students to the learning

community coordinating council. Except as otherwise provided in this section, the school board 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....”

42. At the time of Petitioners’ option enrollment application, [redacted] had been attending preschool at Pierce Public School District, but [redacted] parents had moved to the Plainview School District, so the Plainview School District arranged, since their preschool facility was at capacity, for [redacted] to continue attending the Pierce School District preschool with Plainview providing all specialized instruction and supports, including speech therapy services, occupational therapy services, physical therapy services and a 1:1 paraeducator. The services were provided by Plainview staff or contracted service providers.

43. Under section 13 of the resolutions adopted by the Pierce Public School District (Exhibit 3), the superintendent was authorized to make decisions on its behalf pursuant to and to apply the criteria articulated by the board’s policy in determining whether to grant or deny option enrollment applications.

44. Exhibit 10, which provides details to the rejection reason in Exhibit 8, not only sets forth the current caseload of the Pierce Public Schools, but states the reasons why the school would need to hire new staff or contract for special support services such as physical therapy and a paraprofessional. While the individualized education plan subsequently made for [redacted] by the Plainview School District said that a paraprofessional may not needed, the plan is that of the Plainview School District, which could be subject to change in the Pierce School District. Also at the time of the application, [redacted] was receiving paraprofessional support. The Pierce School District is not employing a physical therapist or an occupational therapist, therefore the services would have to be contracted. Pierce Public School board members confirmed in conversations with one of the Petitioners that the special education program was not accepting option enrollment students as it was at capacity.

45. 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 [redacted] *v. F. Calhoun Community Schools*, NDE No. 10-03.

46. The State 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. *Ibid.* 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. One who raises the question has the burden of proving the facts showing the invalidity of such act. See *Hansen v. City of Norfolk*, 201 Neb. 532, N.W.2d 537 (1978). This would apply to school board resolutions. *Kolesnick v. Omaha Public School District*, 251 Neb. 575, 558 N.W.2d 807 (1997).

47. The Respondent has cited Neb. Rev. Stat. § 79-244 with the premise that would not be eligible to transfer as an option student into the district providing services to a child with a disability under contract with the child's home district. However it is not clear that such statute meant for this to apply for a subsequent school year. The Petitioners allege the violation of the Americans with Disabilities Act and Rehabilitation Act, yet have not cited facts rising to the level of discrimination or failure to follow such acts. The school district's standards with regard to option students go to the increase in operating costs and the hiring of new staff, both of which factors were used in the determination to deny the option enrollment.

48. The Petitioners interpret the option enrollment statutes as requiring a school district to give specific maximum student numbers for every program, class, grade level, or school building, without any flexibility for the specific needs of option students who may increase the operating costs or staff needs of the school district. This is too narrow of an interpretation of the statute, as shown by previous decisions of the State Board of Education and by the language of the statute, which also allows the school board to simply by resolution declare a program unavailable to option students due to lack of capacity, which authority was in this instance delegated to the superintendent.

49. There is no basis for a determination that the procedures of Neb. Rev. Stat. §§ 79-234 to 79-241 (Reissue 2014), nor any other requirements of law, were not followed by the Respondent school district in this 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.


RECOMMENDED DECISION

The following is recommended by the Hearing Officer:

(a) That the Respondent School District's decision to deny the Petitioner's option enrollment application be affirmed;

(b) The State Board of Education as a part of its order shall 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.

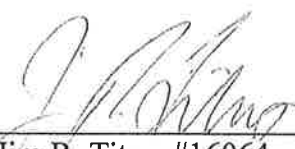
Dated this 20th day of May, 2016.



Jim R. Titus, #16064, Hearing Officer
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CERTIFICATE OF SERVICE

The undersigned, Jim R. Titus, hereby certifies that the original of the foregoing was served upon Margaret D. Worth and Scott Summers, General Counsel for the Department of Education, 301 Centennial Mall South, 6th Floor, Lincoln, NE 68509, and a true and correct copy of the foregoing was served upon Dan Alberts, 3850 Orchard Street, Lincoln, NE 8503-2142 and Karen A. Hasse, 301 S. 13th Street, Suite 210, Lincoln, NE 68508 by United States mail, postage prepaid on May 20, 2016.



Jim R. Titus, #16064
Hearing Officer