

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

BRANDON & STEPHANIE

Petitioners,

v.

SCOTTSBLUFF PUBLIC SCHOOLS  
1722 First Ave.  
Scottsbluff, NE 69361

Respondent.

CASE NO. 17-04

**FINAL ORDER**

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, Kloie in the Scottsbluff Public Schools for the 2017-2018 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 and exhibits.


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 Scottsbluff Public Schools' decision to deny the Petitioners' option enrollment application is affirmed and the Petitioner's appeal to this Board is denied.

Dated this 2 day of June, 2017.

NEBRASKA STATE BOARD OF EDUCATION

  
\_\_\_\_\_  
John Witzel, Vice-President  
State Board of Education  
(Acting in the absence of President Patricia Timm)

The vote by the State Board of Education to approve the Final Order in Case No. 17-04 on June 2, 2017, was 7 in favor, 0 against, 0 abstaining, and 1 absent.

Individual State Board members voted as follows:

IN FAVOR: P. KOCH JONES, L. FRICKE, R. WISE, J. WITZEL, M. NICKELS,

M. O'HOLLERAN, P. MCPHERSON

AGAINST: \_\_\_\_\_

ABSTAINING: \_\_\_\_\_

ABSENT: P. TIMM \_\_\_\_\_

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon Brandon & Stephanie \_\_\_\_\_ and Scottsbluff Public Schools, 1722 First Ave., Scottsbluff, NE 69361 via United States Mail, certified mail return receipt requested and hand delivered to Scott Summers, General Counsel, Nebraska Department of Education, 301 Centennial Mall South, 6<sup>th</sup> floor, Lincoln, NE, on this 2nd day of June, 2017.

  
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**COPY**



BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

BRANDON & STEPHANIE )  
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)  
)  
)  
Petitioners, )  
v. )  
SCOTTSBLUFF PUBLIC SCHOOLS )  
Richard Myles, Superintendent )  
1722 First Avenue )  
Scottsbluff, NE 69361 )  
Respondent. )

CASE NO. 17 - 04

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

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 daughter, Kloie , in the Scottsbluff Public School District for the 2017-18 school year. The parties have waived an in-person hearing and are submitting the matter on stipulated facts and exhibits to the Hearing Officer, Jim R. Titus, appointed by the State Board of Education ("Board").

An email dated May 22, 2017 confirmed the parties' stipulation that an in-person hearing be waived, that the materials in the Board's file shall be submitted without objection as exhibits for the hearing officer to consider, that the Respondent may submit a statement to add as an exhibit, which if not objected to by the Petitioners within 3 days will be admitted and that the letters in the Board's file shall serve as the parties' briefs in this matter. No objections have been filed, therefore the following pleadings which were received and placed in the Board's file shall all be received as Exhibit 1, consisting of the following filings: 1. Petition of appeal dated April 20, 2017 with two attachments being the Application for Student Transfer and the Respondent's denial letter; 2. Certificate of Service of petition; 3. Letter to parties from Scott Summers dated April 20, 2017; 4. Respondent's responsive pleading consisting of a letter dated April 28, 2017 with one attachment of its board's policy; 5. Assignment to Hearing Officer; 6. Letter to parties dated May 5, 2017 from Scott Summers; 7. Email from Hearing Officer dated May 18, 2017 to

parties and their responses dated May 22, 2017; and 8. Respondent's exhibit of chart of Multicategorical Students as of May 2017 and the Respondent's board's policy and resolution on nonresident students; together with certified mail receipts.

Having considered the stipulated 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. Brandon and Stephanie (the "Petitioners") are the parents of Kloie ("Kloie").
2. Scottsbluff Public Schools is a school district as defined by Neb. Rev. Stat. § 79-101(1).
3. Kloie attended the Gering Public Schools for its Pre-K program with an IEP for her autism diagnosis and is scheduled to attend the Special Needs Program within Gering Public Schools as a kindergartner for the 2017/2018 school year.
4. Petitioners believe that the Gering Public Schools would not be a good setting for Kloie's education to continue to grow, but that the program in the Scottsbluff Public Schools would provide a more flexible environment and a staff that better understands her needs. Petitioners plan to relocate into Scottsbluff this summer of 2017, but the relocation process is taking longer than expected and they believe transition can be difficult for Kloie and will prolong her adjustment.
5. The Respondent denied the Petitioners' Enrollment Option Program Application for Transfer for the reason that the program is at capacity.
6. The Respondent's board adopted a resolution on June 7, 2010 adopting specific standards for acceptance and rejection under the enrollment option program, which includes that the maximum number of students per grade level or program for Multicategorical is 5. Respondent's current number of students in the program is 8, so they are over capacity.
7. Respondents applied for student transfer for Kloie on about March 31, 2017. The Respondent denied the application on April 7, 2017 for the reason that its program was at capacity. The Petitioners timely appealed.

#### RECOMMENDED CONCLUSIONS OF LAW

8. 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.

9. 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.

10. Neb. Rev. Stat. § 79-238 (1) (Cum. Supp. 2016) provides 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. False or substantively misleading information submitted by a parent or guardian on an application to an option school district may be cause for the option school district to reject a previously accepted application if the rejection occurs prior to the student's attendance as an option student.

11. The Respondent has adopted by resolution specific standards for acceptance and rejection of applications for option students, which include the capacity of the program relevant to this student.

12. The Petitioners have not stated any statutory or regulatory defects in the denial by the Respondent, but are asking the Board to reverse the denial because they intend to move to the Scottsbluff School District, but may not be able to by the commencement of the school year. There is no evidence of any home in the process of being rented or purchased in the school district, but only the plan and intent to move.

13. While the Petitioners' intent may be sincere, 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 *Soby v. F. Calhoun Community Schools*, NDE No. 10-03.

14. 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).

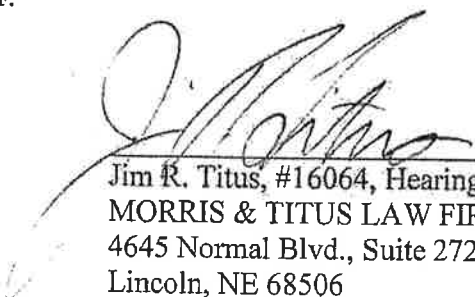
15. There is no basis for a determination that the procedures of Neb. Rev. Stat. §§ 79-234 to 79-241, nor any other requirements of law, were not followed by the Respondent school district in this denial of this application, nor that this denial was arbitrary or unreasonable. Therefore, the determination 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 30<sup>th</sup> day of May, 2017.

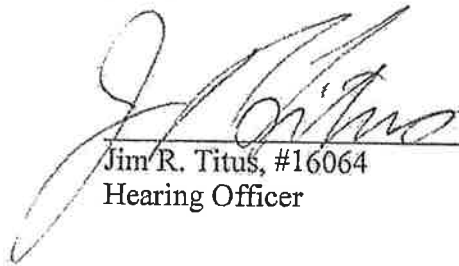


Jim R. Titus, #16064, Hearing Officer  
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CERTIFICATE OF SERVICE

The undersigned, Jim R. Titus, hereby certifies that the original of the foregoing was served upon Scott Summers, General Counsel for the Department of Education, 301 Centennial Mall South, 6<sup>th</sup> Floor, Lincoln, NE 68509, and a true and correct copy of the foregoing was served upon Brandon & Stephanie upon Scottsbluff Public Schools, Richard Myles, Superintendent, 1722 First Avenue, Scottsbluff, NE 69361 by United States mail, postage prepaid on May 30, 2017.



\_\_\_\_\_  
Jim R. Titus, #16064  
Hearing Officer