

**BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA**

**NORMAN NEWHOUSE and IRENE
NEWHOUSE, Parents of ABIGAIL L.
NEWHOUSE,
6521 Perry Circle
Lincoln, Nebraska 68516**

Petitioners,

vs.

**SCHOOL DISTRICT NO. 0001 OF
LANCASTER COUNTY, NEBRASKA,
a/k/a LINCOLN PUBLIC SCHOOLS,
P.O. Box 82889
Lincoln, Nebraska 68501-2889,**

Respondent.

Case No. 98-03

FINAL ORDER

Petitioners filed this appeal pursuant to §005, Title 92, Chapter 7 of the Nebraska Administrative Code, and §79-239, *et seq.* R.R.S. (as amended to date), and in accordance with Title 92, Chapter 61 of the Nebraska Administrative Code. Petitioners request that the State Board of Education reverse the Respondent Board of Education's decision disapproving the application filed by Mrs. Newhouse to enroll her daughter, Abigail Newhouse, in the Option School District, (Lancaster County School District 0001, a/k/a Lincoln Public Schools, under the Nebraska Enrollment Option Program for the 1998/99 school year.

Respondent requests that the State Board of Education dismiss the Petitioners' appeal with prejudice at Petitioners' cost, for attorney fees and to declare the Nebraska Enrollment Option Program contained in *Neb. Rev. Stat. §79-232, et seq.*, unconstitutional and for other appropriate relief.

The hearing on this matter commenced at 9:00 o'clock a.m. on June 9, 1998, before Dennis

C. Tegtmeier, Hearing Officer, appointed by the State Board of Education. The Petitioners were represented by attorney Neal Stenberg of the law firm Harding, Schulz and Downs, P.C., 800 Lincoln Square, 121 So. 13th Street, P.O. Box 82028, Lincoln, NE 68501-2028. Respondent was represented by attorney Gregory H. Perry of the law firm Perry, Guthery, Haase & Gessford, P.C., 233 South 13th Street, Suite 1400, Lincoln, Nebraska 68508.

The hearing was held pursuant to Prehearing Conference Orders entered in this appeal and a Notice of Hearing mailed to the parties on May 5, 1998, by certified mail, return receipt requested. The hearing was conducted pursuant to Nebraska Department of Education Rule 61, Rules of Practice and Procedure for Hearings in Contested Cases Before the Department of Education, Title 92, Nebraska Administrative Code, Chapter 61, (effective date October 1, 1997 revised), and in accordance with the Nebraska Administrative Procedure Act, *Neb. Rev. Stat.* §84-901 *et seq.* as amended to date.

The hearing was a formal hearing in that the Respondent requested that the rules of evidence for the District Court of Nebraska be applied to the hearing in accordance with §84-914 *Neb. Rev. Stat.* (Reissue 1994) and §007 Title 92, Nebraska Administrative Code, Chapter 61 (NDE Rule 61).

The hearing was tape recorded and transcribed by General Reporting Service, Inc., 304 South 13th Street, Lincoln, Nebraska 68508, (402) 477-8425.

During the hearing, Respondent made a motion for a directed verdict which was denied (T184:11-16) by the Hearing Officer. The Hearing Officer recommends that the State Board of Education deny Respondent's Motion for a Directed Verdict.

The hearing in this matter was completed at approximately 4:40 p.m. on June 9, 1998. At that time, the Hearing Officer closed the record and advised the parties that he would be submitting his proposed Findings of Fact, Conclusions of Law and Recommendation to the State Board of

Education for consideration at the State Board of Education's August 14, 1998 meeting. The parties were ordered to submit simultaneous legal briefs to the Hearing Officer on June 26, 1998, and on July 1, 1998, submit reply briefs, proposed Findings of Fact and proposed Conclusions of Law simultaneously to the Hearing Officer. The parties have complied.

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. Petitioners' appeal was properly perfected pursuant to Nebraska law and proper notice 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 jurisdiction to review the Respondent's decision rejecting Petitioners' application to transfer to the Respondent's School District for the 1998/99 school year under the Nebraska Enrollment Option Program, *Neb. Rev. Stat. §79-232 et seq.* as amended to date.

4. The State Board of Education has jurisdiction to review decisions rejecting applications to transfer under the Nebraska Enrollment Option Program, *§79-232 et seq., Neb. Rev. Stat.* as amended to date, goes beyond determining whether the procedures of §§ 79-234 to 79-241 have been followed, that is whether the rejections comply with other requirements of the law.

5. The State Board of Education has authority not only to determine whether the Respondent followed the procedures of §§ 79-234 to 79-241, in rejecting Petitioners' application,

but also to determine whether Respondent's rejection of Petitioners' application is contrary to law, not based upon fact and is otherwise improper under the standards set forth in §79-238 *Neb. Rev. Stat.* (R.S. Supp. 1997).

6. The State Board of Education finds as a matter of law that the Petitioners had the burden of proof to prove by clear and convincing evidence, that the option school district failed to follow the procedures of the Nebraska Enrollment Option Program in rejecting Petitioners' application for transfer of their child to the option school district for the 1998/99 school year and the **Petitioners so proved.**

7. The State Board of Education finds that the Respondent's Board of Education failed to follow the procedures of *Neb. Rev. Stat.* §79-234 to §79-241, as amended to date, in rejecting Petitioners' application for their daughter, Abigail Newhouse, to attend school in the Respondent option school district under the Nebraska Enrollment Option Program for the 1998/99 school year.

8. Respondent's Motion for a Directed Verdict made during the hearing is denied.

9. Petitioners' appeal is sustained.

10. Respondent shall approve the Petitioners' application for transfer of their daughter, Abigail Newhouse, to attend school in the option school district for the 1998/99 school year and following years, in accordance with *Neb. Rev. Stat.* §79-235.


11. Any Finding of Fact which is more properly considered a Conclusion of Law shall be so construed. Alternatively, any Conclusion of Law which is more appropriately considered as a Finding of Fact shall be so construed.

12. The Hearing Officer's Findings of Fact and Conclusions 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.

13. The State Board of Education has reviewed the Respondent's written exceptions to the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation and finds such exceptions to be without merit.

Dated this 14th day of August, 1998.

NEBRASKA STATE BOARD OF EDUCATION



Douglas D. Christensen
Secretary of the Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 98-03, on August 14, 1998, was 8 in favor, _____ against, _____ abstaining, _____ absent.

The individual State Board members voted as follows:


IN FAVOR: K. Peterson, Ann Mactier, B. Peterson, Rick Savage, Katherine Endacott, Terry Loschen, Kathy Wilmot, Kathleen McCallister

AGAINST: _____

ABSTAINING: _____

ABSENT: _____

DATE: August 14, 1998.



Douglas D. Christensen,
Commissioner of Education and
Secretary of the Board of Education

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and the foregoing Final Order was forwarded to the parties or their attorneys by certified United States mail, postage prepaid on the 17th day of August, 1998;

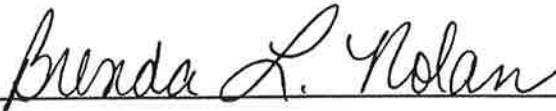
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**HEARING OFFICER'S FINDINGS
OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Petitioners filed this appeal pursuant to §005, Title 92, Chapter 7 of the Nebraska Administrative Code, and §79-239, *et seq.* R.R.S. (as amended to date), and in accordance with Title 92, Chapter 61 of the Nebraska Administrative Code. Petitioners request that the State Board of Education reverse the Respondent Board of Education's decision disapproving the application filed by Mrs. Newhouse to enroll her daughter, Abigail Newhouse, in the Option School District, (Lancaster County School District 0001, a/k/a Lincoln Public Schools, under the Nebraska Enrollment Option Program for the 1998/99 school year.

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Education for consideration at the State Board of Education's August 14, 1998 meeting. The parties were ordered to submit simultaneous legal briefs to the Hearing Officer on June 26, 1998, and on July 1, 1998, submit reply briefs, proposed Findings of Fact and proposed Conclusions of Law simultaneously to the Hearing Officer. The parties have complied.

The Hearing Officer, having considered the stipulations of the parties, evidence received, the legal briefs of the parties and the parties' proposed Findings of Fact and Conclusions of Law, makes the following Findings of Fact, Conclusions of Law and Recommendation:

FINDINGS OF FACT

1. The Newhouses reside in Lancaster County School District 145 (the "resident school district"). Mrs. Newhouse filed an option enrollment application to have her daughter, Abigail, (DOB 2/12/93) attend Lancaster County School District 0001, a/k/a Lincoln Public Schools (the "option school district"). The application was for enrollment in the 1998-99 school year, at which time Abigail will be at the kindergarten grade level. (Exhibit "1"). The application was filed on February 2, 1998. The application was not accompanied by a written release from the resident school district as prescribed by *Neb. Rev. Stat. §79-237* for applications submitted after the statutory deadline of January 1, 1998.

2. January 1, 1998 was the statutory deadline for submitting applications to the option school district for enrollment in the option school district for the 1998-99 and subsequent school years. See *Neb. Rev. Stat. §79-237*.

3. In March of 1997, Irene Newhouse contacted Lincoln Public Schools and inquired concerning the procedure for making application for Abigail to attend Lincoln Public Schools as a kindergartner under the Option Enrollment Program, *Neb. Rev. Stat. §79-232 et seq.*, commencing in the fall of 1998.

4. The Petitioners have alleged that Mrs. Newhouse was told, in the March 1997 call to the option school district's telephone number, that the school district would not accept option enrollment applications until after January 1st. (Petition, paragraphs 5 and 6). Mrs. Newhouse testified that she contacted the main telephone number at Lincoln Public Schools by calling 436-1000. She testified the phone was answered "Lincoln Public Schools" by the person on the other end of the line. She testified that the person who answered the phone did not identify herself. She testified that she told the person who answered the phone that she wanted to speak with someone regarding option enrollment information. She testified that the operator who answered the phone then transferred her to student services. She testified that after the call was transferred, a woman came on the line, but she did not identify herself. Mrs. Newhouse testified that she then asked "What do I need to do to get my daughter – information about optional enrollment?" Mrs. Newhouse testified that she was told that she could not submit an application until after January 1 of 1998. Mrs. Newhouse testified that she also had a discussion with the individual in student services about obtaining an option enrollment application form. Mrs. Newhouse testified that she was told by this same individual that the school district would not send out any application forms prior to January 1. (T19:6-28:8).

5. There is no evidence in the record that any of the foregoing statements allegedly made to Mrs. Newhouse were made by an authorized representative of the Respondent. Therefore, I find that such statements were not made to Mrs. Newhouse by an authorized representative of the Respondent.

6. There is no evidence in the record that any of the foregoing statements allegedly made to Mrs. Newhouse, were approved by the Respondent. Therefore, I find that such statements were not approved by the Respondent.

7. In addition to the alleged March 1997 telephone conversation, Mrs. Newhouse testified about a conversation with the option school district's Board member Marian Price. Mrs. Newhouse testified that Marian Price told her, at a December 11, 1997 Christmas party, "to get our application in after the 1st of the year." (T34:5-19) This alleged December 11, 1997 conversation was not set forth in the Petition, nor was it set forth by the Newhouses when they made efforts to have the Board accept their late filed application. *See* Exhibit "3" (February 11, 1998 letter of Mrs. Newhouse to Marian Price) and Exhibit "41" (videotape of March 10, 1998 Board meeting at which the Newhouses presented their appeal). Marian Price testified she made no such statement to Mrs. Newhouse. (T186:16-20) On the date of the alleged conversation (December 11, 1997), the Board's policy for the 1998-99 school year had not been adopted. *See* Exhibit "37" (Minutes of December 16, 1997 Board meeting at which policy was adopted).

8. The statement allegedly made by Marian Price was **not** made.

9. The evidence established that only Dr. Wild and Judy Tenhulzen were authorized to provide information concerning option enrollment, and that all other staff within the Department of Student Services had been directed to not attempt to provide such information. Also, Marian Price had no authority to provide information on behalf of the option school district.

10. *Neb. Rev. Stat. §79-243* provides that a "school district shall make information about the school district and its schools, programs, policies, and procedures available to all interested people."

11. The option school district made information about the school district and its schools, programs, policies, and procedures available to all interested people.

12. On December 16, 1997, the Board of Education of the option school district adopted a resolution which established a January 12, 1998 deadline for option enrollment applications for

the 1998-99 school year. The Resolution reads as follows:

BE IT RESOLVED that the Lincoln Public Schools shall accept K-12 option enrollment students for the 1998-99 school year on the condition that the filing deadline will not be waived and that:

A. The option enrollment application is received by January 12, 1998;

B. The option enrollment student otherwise meets all statutory or legal conditions or requirements for option enrollment and attends Lincoln Public Schools on a full-time basis; and,

C. Except as otherwise required by law, that all programs, classes and buildings of assignment shall at all times and from time to time during attendance at Lincoln Public Schools be determined by Lincoln Public Schools

Exhibit "37", pp. 6-7.

13. The option school district's Board policy for option enrollment for the 1998-99 school year was available at each of its school buildings, including the particular elementary school which the Petitioners wanted their child to attend. The Board meeting at which the option enrollment policy adopted was open to the public, reported in the press and televised. (Testimony of Dr. Wild (T146:13-147:22))

14. On February 24, 1998, the Board of Education of the option school district adopted a motion, by a unanimous (6-0) vote, to disapprove Abigail Newhouse' option enrollment application for the 1998-99 school year. The stated reason for rejecting the application was that it was "filed after deadline." (Exhibit "1"). Option enrollment applications for other late-filed applications were also disapproved. (Exhibit "39").

15. The rejection of Abigail Newhouse' option enrollment application was received by the petitioners after March 2, 1998. (Testimony of Mrs. Newhouse, T87:22-25; 88:1-4 and Exhibit

"4").

16. The disapproval of Abigail Newhouse's application was consistent with the option enrollment policy which had been adopted by the Board of Education of the option school district for the 1998-99 school year. (Exhibit 27, pp. 6-7). However, the evidence shows two occasions where the January 12, 1998, deadline established for the 1998-99 school year has been waived by the option school district's Board of Education. The evidence shows that on those two occasions the option school district's Board of Education by resolution found "unique circumstances" and approved the applications for enrollment in its school district without the resident school district signing the application waiving the January 1, 1998 statutory deadline, and there is no evidence in the record that the applications which were submitted after January 1, 1998, to the option school district, were accompanied by a written release from the resident school district or by agreement of the school board or board of education of the option school district and the resident school districts that the deadline was waived:

- (1) Application marked as Exhibit "9", page 11, and acted upon at the 3/24/98 Board meeting marked as Exhibit "42" – "unique circumstances" involving a private school student who needed one class and the class scheduling was not available until after January 12; and
- (2) Application marked as Exhibit "9", page 15, and acted upon at the 4/28/98 Board meeting marked as Exhibit "43" – "unique circumstances" involving a child who is the sibling of a student **currently** enrolled at LPS.

(Note, that another application was administratively marked as approved, but the Board minutes in regard to that application show that the Board did not act to approve that application, which involved another sibling situation. See Exhibit "9", page 7 (Student No. 163223) and Exhibit "38", p. 7). No sibling of Abigail currently attends LPS, and she is not a private high school student seeking to take

one class.

17. Prior to being amended by LB 1050 in 1996, subsection 4 of §79-240 (formerly §79-3409) required option and resident school districts to waive the January 1 deadline for the siblings of option enrollment students under certain circumstances.

18. *Neb. Rev. Stat.* §79-3409 (now codified at §79-240) provided in relevant part as follows:

79-3409. Deadlines; waiver; relocation; automatic acceptance.

* * *

(4) The sibling of any option student shall be automatically accepted as an option student in the district in which the option student is enrolled and all deadlines imposed by section 79-3409 shall be waived if the sibling makes application for participation in the enrollment option program for the same school year as the option student first makes application or, if the sibling is not yet of school age for the school year for which the option student first made application, the sibling makes application for the first school year in which the sibling is of school age. Capacity limitations of the option district shall be waived as to siblings who meet the requirements for automatic acceptance as option students under this section.

Source: Laws 1989, LB 183 §9; Laws 1990, LB 843, §9; Laws 1991, LB 207, §6; Laws 1992, LB 1001, §39; Laws 1993, LB 348, §68.

(Emphasis added).

19. Effective on April 6, 1996, subsection 4 of §79-240 was amended and now reads in pertinent part as follows:

(4) The sibling of any option student who has, before April 6, 1996, been accepted as an option student in the district in which the option student is enrolled shall be eligible to continue attending the option school district as an option student as provided in section 79-234.

(Emphasis added).

20. After April 6, 1996, option school districts were no longer required to waive the filing deadline for siblings of option students.

21. At all relevant times, the enrollment option program statutes did not contain any provision which required either the option or resident school districts to waive the January 1 deadline for the siblings of option enrollment students under any circumstances.

22. There is **not** any agreement entered into between the Board of Education of the resident school district and the option school district to waive the deadlines for application and approval or rejection of Petitioners' application pursuant to *Neb. Rev. Stat. §79-240* (T162:15-18).

23. There is no evidence in the record that the resident school district has a desegregation plan adopted by their Board of Education or ordered by the federal court, as provided in *Neb. Rev. Stat. §79-237*. Therefore, Petitioners were **not** required to submit an application to the School Board or Board of Education of the resident school district between September 1 and January 1 for enrollment in the option school district in the 1998/99 school year and following years.

24. On November 3, 1997, the Board of Education of the resident school district voted to not waive the deadlines for application and approval or rejection of enrollment option applications for the 1998-99 school year. (Exhibit 44, p. 5).

25. On March 31, 1998, the Petitioners filed with the State Board of Education their Petition asking that the State Board of Education enter an order requiring Lincoln Public Schools to accept the option enrollment application submitted by the Petitioners, and to enroll Abigail Newhouse in Lincoln Public Schools for the 1998-99 and following school years.

26. On or about May 4, 1998, Petitioners requested the Board of Education of the resident school district to waive the option enrollment deadline for Abigail Newhouse's application

to enroll in the option school district for the 1998-99 and following school years. (Exhibit 44, p. 2).

27. On May 4, 1998, a motion was made at a regular May meeting of the Board of Education of the resident school district to waive the option enrollment deadline for Abigail Newhouse' application to enroll in the option school district for the 1998-99 and following school years, and it failed. (Exhibit 44, p. 2).

28. On June 8, 1998, the Petitioners filed a Petition with the State Board of Education asking that the State Board of Education enter an order requiring Waverly Public Schools to accept the option enrollment application submitted by the Petitioners and to permit Abigail Newhouse to enroll as a student in the Lincoln Public Schools for the 1998-99 and following school years. That appeal is presently pending. (Exhibit 47, Testimony of Mrs. Newhouse T89:7-12 and Stipulation of the parties T89:13-16).

29. Any Finding of Fact which is more properly considered a Conclusion of Law shall be so construed. Alternately, any Conclusion of Law which is more appropriately considered as a Finding of Fact shall be so construed.

EXHIBITS

The following exhibits were identified, offered and received into evidence unless otherwise noted:

<u>EXHIBIT</u>	<u>PAGES</u>	<u>DESCRIPTION</u>
1	2	Newhouse application for student transfer dated 1-30-98.
2	1	Handwritten note from Judy to Irene Newhouse dated January 30.
3	1	Correspondence from Irene Newhouse to Marian Price dated 2-11-98.
4	1	Correspondence from Becky Wild to Irene Newhouse dated 2-27-98.

5	1	Correspondence from Keith Bartels to Norma [sic] Newhouse dated 3-13-98.
6	2	LPS production response dated 5-26-98.
7	39	Category "A" option enrollment applications for '96-'97 school year.
8	41	Category "A" option enrollment applications for '97-'98 school year.
9	15	Category "B" option enrollment applications for '98-'99 school year.
10	25	Category "B" option enrollment applications for '96-'97 school year.
11	25	Category "B" applications for '97-'98 school year.
12	n/o	Call message dated 1-30-98.
13	n/o	Letter from Irene Newhouse to Marian Price.
14	n/o	Memo from Dr. Wild to Marian Price dated 3-4-98.
15	n/o	Call message dated 3-4-98.
16	n/o	Memo from Dr. Wild to Dr. Moore dated 3-12-98.
17	1	Receptionist directions.
18	2	Newhouse application filed 9-11-92.
19	5	Board agenda materials and minutes dated 12-12-95.
20	4	Board agenda materials and minutes dated 1-23-96.
21	3	Board agenda materials and minutes dated 2-13-96.
22	5	Board agenda materials and minutes dated 3-26-96
23	2	Board agenda materials and minutes dated 4-23-96.
24	3	Board agenda materials and minutes dated 8-13-96.
25	2	Board agenda materials and minutes dated 9-24-96.
26	3	Board agenda materials and minutes dated 11-12-96.

27	4	Board agenda materials and minutes dated 11-26-96.
28	3	Board agenda materials and minutes dated 12-10-96.
29	7	Board agenda materials and minutes dated 2-11-97.
30	2	Board agenda materials and minutes dated 3-11-97.
31	2	Board agenda materials and minutes dated 3-25-97.
32	3	Board agenda materials and minutes dated 4-8-97.
33	3	Board agenda materials and minutes dated 5-13-97.
34	2	Board agenda materials and minutes dated 7-22-97.
35	4	Board agenda materials and minutes dated 9-9-97.
36	3	Board agenda materials and minutes dated 11-25-97.
37	7	Board agenda materials and minutes dated 12-16-97.
38	8	Board agenda materials and minutes dated 2-10-98.
39	7	Board agenda materials and minutes dated 2-24-98.
40	3	Board agenda materials and minutes dated 3-10-98.
41		Videotape of board meeting.
42	6	Board agenda materials and minutes dated 3-24-98.
43	2	Board agenda materials and minutes dated 4-28-98.
44	6	Lancaster County School District 145 board minutes dated 11-3-97, 5-4-98 and letter dated 5/7/98 addressed to Mrs. Irene Newhouse.
45	n/o	LPS state aid, per pupil cost and cost data memo reports.
46	22	Deposition of Callen Frenzel taken on 6-8-98.
47	6	Petition
49	4	Board agenda materials and minutes dated 8-27-97.

50	2	LPS board materials for 4-9-96 meeting date.
51	5	Reference sheet.
52	1	Frenzel application for option enrollment.

Exhibits 12, 13, 14, 15, 16 and 45 were not offered in evidence. Therefore they were not received in evidence.

Respondents objection to Petitioners' offer of Exhibit 48 was sustained as to Respondent's objection that Exhibit 48 was not listed on Petitioners' Exhibit List and exchanged with Respondent in accordance with the Prehearing Conference Order (T181:10-184:8).

The parties stipulated that the Petitioners' appeal with the State Board of Education against Lancaster County School District 145 (the resident school district) has not been resolved (T89:7-15).

The Hearing Officer took judicial notice of the petition, which was filed in this proceeding, and this appeal, which was filed on March 31, 1998, and all of the filings through the date of the hearing. (T201:15-202:25)

WITNESSES

Petitioners called the following witnesses in their case-in-chief:

1. Irene R. Newhouse, one of the Petitioners, and mother of Abigail L. Newhouse;
2. Norman Newhouse, one of the Petitioners, and father of Abigail L. Newhouse;
3. Dr. Becky K. Wild, Director of Student Services, Lincoln Public Schools; and
4. Callen Frenzel, neighbor of Irene and Norman Newhouse, by deposition taken 6-8-96. (Exhibit 46)

Respondent called the following witnesses in its case-in-chief:

1. Marian Price, member of the Board of Education, Lincoln Public Schools;
2. Kathleen J. Novak, receptionist, Lincoln Public Schools; and

3. Judy J. Tenhulzen, Secretary to Director of Student Services and Office Manager,
Lincoln Public Schools.

Petitioner called the following rebuttal witnesses:

1. Norman L. Newhouse; and
2. Irene R. Newhouse.

Respondent did not call any rebuttal witnesses.

ISSUES

After reviewing the pleadings, prehearing order, evidence, briefs of the parties and proposed Findings of Fact and Conclusions of Law, the Hearing Officer finds that the following issues are before him and the State Board of Education to decide:

Re Issue #1: **Whether the State Board of Education has jurisdiction to resolve claims outside the issue of whether the procedures of *Neb. Rev. Stat.* §79-234 to §79-241, as amended to date, were followed by the Option School District, Lancaster County School District No. 0001 a/k/a Lincoln Public Schools, in rejecting Petitioner Irene Newhouse' application for her daughter, Abigail L. Newhouse, to attend school in the Option School District, Lancaster County School District 0001 a/k/a Lincoln Public Schools under the Enrollment Option Program for the 1998/1999 school year.**

Re Issue #2: **Whether the procedures of *Neb. Rev. Stat.* §79-234 to §79-241 as amended to date, were followed by the Option School District, Lancaster County School District No. 0001 a/k/a Lincoln Public Schools, in rejecting Petitioner Irene Newhouse' application for her daughter, Abigail L. Newhouse, to attend school in the Option School District, Lancaster County School District 0001 a/k/a Lincoln Public Schools under the Enrollment Option Program for the 1998/99 school year.**

ANALYSIS AND CONCLUSIONS OF LAW

Re Issue #1: Whether the State Board of Education has jurisdiction to resolve claims outside the issue of whether the procedures of *Neb. Rev. Stat.* §79-234 to §79-241, as amended to date, were followed by the Option School District, Lancaster County School District No. 0001 a/k/a Lincoln Public Schools, in rejecting Petitioner Irene Newhouse' application for her daughter, Abigail L. Newhouse, to attend school in the Option School District, Lancaster County School District 0001 a/k/a Lincoln Public Schools under the Enrollment Option Program for the 1998/1999 school year.

I find that Petitioners' appeal is brought pursuant to, and governed by, NEB. REV. STAT. §79-239.

If an application is rejected by the option school district or by the resident school district, the rejecting school district shall state in the notification the reason for the rejection. The parent or legal guardian may appeal a rejection to the State Board of Education within thirty days of the date the notification of the rejection was received by the parent or legal guardian. Such hearing shall be held in accordance with the Administrative Procedure Act and shall determine whether the procedures of sections 79-234 to 79-241 have been followed.

(Emphasis added).

I find that Rule 7, regulations for enrollment option program, at Section 5.06; sets forth appeal rights using identical language.

Respondent argues that various claims and allegations sought to be raised by the Petitioners, do not come within the scope of the "procedures" of the option statutes. Respondent argues those claims and allegations should be dismissed and the State Board of Education should limit itself, as far as these appeals are concerned, to the jurisdiction conferred upon it by *Neb. Rev. Stat.* §79-239. Respondent argues that since the evidence is clear that all statutory procedures were followed, Petitioners' appeal should be completely dismissed.

Petitioners' Petition alleges three claims for relief:

FIRST CLAIM FOR RELIEF

Failure to Follow Statutory Procedures

10. The petitioners hereby incorporate the allegations contained in paragraphs 1 through 9 by reference.
11. *Neb. Rev. Stat.* §79-243 provides that a "school district shall make information about the school district and its schools, programs, policies, and procedures available to all interested people."
12. Lincoln Public Schools violated the provisions of §79-243 by knowingly or negligently providing false information to the petitioners concerning the school district's deadline for filing an option enrollment application. Specifically, Lincoln Public Schools told the petitioners that an option enrollment application should be filed after January 1, 1998, for enrollment during the 1998-99 school year. The petitioners relied on the inaccurate information provided to them by Lincoln Public Schools to their detriment.

SECOND CLAIM FOR RELIEF

Estoppel

13. The petitioners hereby incorporate the allegations contained in paragraphs 1 through 12 by reference.
14. Except for the inaccurate information provided to the petitioners by Lincoln Public Schools, petitioners would have filed their option enrollment application prior to January 1, 1998. The petitioners relied to their detriment on the statements made by Lincoln Public Schools to the effect that the option enrollment application should be filed after January 1, 1998. Under these circumstances, the respondent should be estopped from denying the option enrollment application submitted on behalf of Abigail Newhouse.

THIRD CLAIM FOR RELIEF

Equal Protection

15. The petitioners hereby incorporate the allegations contained in paragraphs 1 through 14 by reference.
16. The petitioners allege on the basis of information and belief that Lincoln Public Schools has, with respect to the 1998-99 school year and prior years, accepted option enrollment applications which were not submitted between September 1 and January 1 for enrollment during the following and subsequent school years.
17. Lincoln Public Schools acted arbitrarily and capriciously, and in violation of the right of the petitioners to Equal Protection under the U.S. Constitution and the Constitution of the State of Nebraska, in rejecting the option enrollment application submitted by the petitioners when the respondent has regularly accepted the option enrollment applications of other persons under the same or similar circumstances.

I find that the Respondent's Board of Education was required to follow certain procedures

contained in *Neb. Rev. Stat. §79-238* (R. S. Supp. 1997) before it could lawfully reject the Petitioners' enrollment option application for the 1998-99 school year, i.e., adopt specific standards for acceptance and rejection of enrollment option applications.

Neb. Rev. Stat. §79-238(1) provides:

79-238. Application acceptance and rejection; standards; desegregation plan; racial integration. (1) Except as provided in section 79-240, the school board or board of education of the option school district **shall adopt by resolution specific standards for acceptance and rejection of applications.** 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 district. 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 district will contract based on existing contractual arrangements, and availability of appropriate special education programs. The school board or board of education 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, handicapping conditions, proficiency in the English language, or previous disciplinary proceedings.

* * *

(Emphasis added).

I find that neither the Nebraska Enrollment Option Program, *Neb. Rev. Stat. §79-234 et seq.* (Reissue 1996), nor "Rule 7" define the word "procedures" contained in §79-239 and Section 7.005.06 of Title 92, Nebraska Administrative Code.

The Hearing Officer has studied all of the decisions of the State Board of Education, since the enactment of the Nebraska Enrollment Option Program in 1989, as to the jurisdiction issue raised by the Respondent. In all of those appeals the State Board of Education determined that it had jurisdiction to review decisions of school districts in which school districts had rejected applications to transfer to another school district under the Nebraska Enrollment Option Program. In deciding those appeals, the State Board of Education found that the Board's authority to hear appeals under

the Nebraska Enrollment Option Program included the Board's review of the standards adopted by the school district for the acceptance and rejection of applications for transfer into a school district. See, most recent decisions, Before the State Board of Education, so holding, *Colburn v. School District No. 59 of Douglas County*, Case No. 97-04, *Enrollment Option Appeals, Lancaster County*, Case No. 95-06, 07, 95-09-95-12, *Cooksley v. Hall County School District*, Case No. 95-28EO.

I find this case does not present any circumstances which would warrant a departure from this established precedent.

The Hearing Officer finds that the Respondent's narrow interpretation of the State Board of Education's authority to hear appeals pursuant to *Neb. Rev. Stat. §79-239* (Reissue 1996) is an unreasonable restriction upon the Board's authority to act in an area of substantive importance.

The Hearing Officer finds that the Board's authority to hear appeals pursuant to §79-239 must include the Board's review of the standards for the acceptance and rejection of applications for transfer into a school district. The adoption of specific standards for acceptance and rejection of enrollment option applications by the Respondent is mandated in §79-238 and necessarily is subject to review by the State Board of Education in an appeal brought under §79-239. Exclusion of such standards from review could lead to the conclusion that the State Board of Education is powerless to prevent school districts from adopting and applying standards that are not in compliance with the Nebraska Enrollment Option Program.

The Hearing Officer finds that parents or legal guardians who have had their applications to transfer denied by a school district have a right to appeal their cases under §79-239. Upon appeal, a mere showing that the Respondent has adopted Enrollment Option Program Standards pursuant to §79-238, for itself, should not satisfy the requirement that the requirements of the Enrollment Option Program have been followed.

I find that the State Board of Education must determine whether the Respondent's standards for the Enrollment Option Program for the 1998/99 school year and as applied to Petitioners' application are in accordance with the express purpose of the limitation to transfers, as outlined in §79-238, keeping in mind that the Enrollment Option Program is a "parental choice law."

Therefore, the Hearing Officer finds that the State Board of Education has jurisdiction to review the Respondent's decision rejecting Petitioner's applications to transfer to the Respondent's school district for the 1998/99 school year under the Nebraska Enrollment Option Program, *Neb. Rev. Stat. §79-232 et seq.* as amended to date.

I find that the State Board of Education has authority **not only** to determine whether the Respondent followed the procedures of §§ 79-234 to 79-241, in rejecting Petitioners' application, but also to determine whether Respondent's rejection of Petitioners' application is contrary to law, not based upon fact and is otherwise improper under the standards set forth in §79-238 *Neb. Rev. Stat.* (R.S. Supp. 1997) as alleged in Petitioners' Petition.

Re Issue #2: Whether the procedures of *Neb. Rev. Stat. §79-234 to §79-241*, as amended to date, were followed by the Option School District, Lancaster County School District No. 0001 a/k/a Lincoln Public Schools, in rejecting Petitioner Irene Newhouse' application for her daughter, Abigail L. Newhouse, to attend school in the Option School District, Lancaster County School District 0001 a/k/a Lincoln Public Schools under the Enrollment Option Program for the 1998/99 school year.

Neb. Rev. Stat. §79-237 provides in pertinent part:

§ 79-237. Attendance; application; cancellation; forms.

(1)(a) Except as provided in subdivision (b) of this subsection, for a student to attend school in an **option school district**, the student's parent or legal guardian shall submit an application to the school board or board of education of the **option school district** between September 1 and January 1 for enrollment during the

following and subsequent school years. **Applications submitted after January 1 shall be accompanied by a written release from the resident school district.** The option school district shall provide the resident school district with the name of the applicant on or before January 15. The option school district shall notify, in writing, the parent or legal guardian of the student, the resident school district, and the State Department of Education whether the application is accepted or rejected on or before April 1.

(Emphasis added).

Neb. Rev. Stat. §79-238(1) provides:

§ 79-238. Application acceptance and rejection; standards; desegregation plan; racial integration.

(1) Except as provided in section 79-240, the school board or board of education of the option school district **shall adopt by resolution specific standards for acceptance and rejection of applications.** 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 district. 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 district will contract based on existing contractual arrangements, and availability of appropriate special education programs. The school board or board of education 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.

* * *

(Emphasis added).

Neb. Rev. Stat. §79-239 provides that:

§ 79-239. Application; rejection; notice; appeal.

If an application is rejected by the option school district or by the resident school district, **the rejecting school district shall state in**

the notification the reason for the rejection. The parent or legal guardian may appeal a rejection to the State Board of Education within thirty days after the date the notification of the rejection was received by the parent or legal guardian. Such hearing shall be held in accordance with the Administrative Procedure Act and shall determine whether the procedures of sections 79-234 to 79-241 have been followed.

(Emphasis added).

Neb. Rev. Stat. §79-243 provides that:

A school district shall make information about the school district and its schools, programs, policies, and procedures available to all interested people.

Petitioners' Arguments

The following are some but not all of the Petitioners' arguments as to why the Respondent Option School District failed to comply with the Enrollment Option Program in rejecting Petitioners' enrollment option application for the 1998/99 school year:

(1) Lincoln Public Schools had an obligation to provide Petitioners with accurate information concerning option enrollment pursuant to *Neb. Rev. Stat. §79-243*.

(2) It follows that if a failure to provide information violates §79-243 then, likewise, providing false, inaccurate or misleading information must also violate this statute.

(3) The evidence presented in this case clearly established that Lincoln Public Schools ("LPS") provided the Petitioners with false information concerning the school district's option enrollment program which caused them to submit an option enrollment application after the statutory deadline of January 1, 1998 (*See, Neb. Rev. Stat. §79-237*), and after the school district's deadline of January 12, 1998. (Exhibit 37).

(4) Whether Waverly Public School approved the option enrollment application

pertaining to Abigail Newhouse is of no relevance to this proceeding.

(5) It is very clear under *Neb. Rev. Stat.* §79-239 that LPS was required to state all the reasons it had for rejecting the option enrollment application submitted by Mr. and Mrs. Newhouse. Even assuming *arguendo* that LPS might have rejected the option enrollment application because the application was not accompanied by a written release from Waverly Public Schools, the school district in this case specifically elected not to reject the application for that reason. The one and only reason stated, and the only reason ever given by the Respondent for rejecting the application, was that it was “filed after deadline” established by the Lincoln Board of Education.

(6) The Petitioners have appealed the action (or lack thereof) taken by the Waverly School District with respect to the Petitioners’ option enrollment application. *See* Exhibit 44. It is very likely that the action taken by the Waverly District will ultimately be reversed by the State Board of Education. Among other things, it is clear that the Waverly Board of Education failed to act on the Petitioners’ option enrollment application after being specifically asked to do so. A motion to approve the application failed. The Waverly Board of Education thus took **no action** on the Petitioners’ request for a waiver even though they were required to do so by law.

(7) Whether the decision of the Waverly Board is ultimately reversed is a matter which is currently in litigation between Mr. and Mrs. Newhouse and the Waverly Board of Education; Lincoln Public Schools has no legitimate interest in the outcome of that litigation. The only matter at issue in this case is whether the Lincoln Board of Education acted improperly as the option district in rejecting the Petitioners’ option enrollment application. If so, then the State Board of Education presumably will reverse the decision of the Lincoln Board of Education and order the Board to accept Petitioners’ option enrollment application. Clearly, that would not mean that Abigail would be entitled to attend Lincoln Public School as an option enrollment student. Waverly will not be

bound by the determination made by the State Board of Education in this case. Abigail will only be entitled to attend Lincoln Public Schools as an option enrollment student if the State Board of Education reverses the decision of both Waverly Public Schools and Lincoln Public Schools. Concomitantly, Lincoln Public Schools will not in any sense be bound by the decision made by the State Board of Education in the Waverly case.

(8) Pursuant to *Neb. Rev. Stat. §79-238(1)*, the Lincoln Board of Education adopted an option enrollment policy for the 1998-99 school year which states unequivocally that “the filing deadline will not be waived.” Exhibit 37. The resolution contains no suggestion that the filing deadline will ever be waived, and certainly contains no “specific standards” indicating the conditions under which the filing deadline might be waived.

(9) Notwithstanding the very clear and unequivocal statement that the filing deadline “will not be waived,” Lincoln Public Schools has with regularity waived the filing deadline, not according to any specific standards, nor according to the requirements of state law, but on a totally ad hoc basis.

(10) *Neb. Rev. Stat. §79-238* requires that a school district must adopt “by resolution specific standards for acceptance and rejection of applications.” In this case, Lincoln Public Schools did not adopt specific standards for the acceptance and rejection of applications of late-filed applications. In the absence of such standards, the Board’s actions in rejecting the Petitioners’ application unlawfully discriminated against the Petitioners and was contrary to the procedures of §§79-234 to 79-241.

(11) Lincoln Public Schools has regularly waived the filing deadline whenever the option enrollment application has had a sibling attending Lincoln Public Schools.

(12) The evidence clearly showed that Lincoln Public Schools regularly waived the

option enrollment filing deadline for the siblings of students attending Lincoln Public Schools, whether such students attended as option students, contract students, or resident students (waiver of the statutory deadline was never statutorily required with respect to the siblings of contract or residents students). The same practice continued in effect after April 6, 1996.

(13) LPS also regularly waived the filing deadline with respect to non-resident students who were attending private schools located within the Lincoln Public School district, such as Pius X. The school district has done so contrary to the provisions of its own policy, and has not acted pursuant to any “specific standards for acceptance and rejection of applications.”

(14) The problem is that almost all children who seek transfer through option enrollment have some legitimate and sometimes compelling reasons for wanting to transfer.

(15) It may be altogether proper for Lincoln Public Schools to differentiate among late-filing option enrollment students so long as the district provides “specific standards for acceptance and rejection of [such] applications” as required by §79-238.

(16) The only standard adopted by the Lincoln Board of Education was that no late option enrollment applications would ever be accepted by Lincoln Public Schools. Surely that standard does not provide a basis for differentiating between the child referred to in Exhibit 8, page 40, and Abigail Newhouse.

(17) The school district has failed to act according to “specific standards” with respect to procedural matters. In that regard, it appears that some parents are given the opportunity to provide substantial information outside the four corners of the option enrollment document, while other applications are judged solely on the basis of the information appearing within the four corners of the document.

(18) In this case, it appears that school district officials did not even consider the

burdens which would be imposed upon Abigail and her parents by the school district's refusal to accept the option enrollment applications.

(19) No one can say that these burdens fail to measure up to Lincoln Public School's "specific standards" because the Board of Education has not adopted "by resolution, specific standards for acceptance and rejections of [late-filed] applications."

(20) It may well be that Lincoln may differentiate among late-filing option enrollment applicants if it does so on the basis of specific standards. The school district may not, however, discriminate against some late-filing option enrollment applicants in the absence of such standards. The is exactly what happened in this case.

(21) By failing to adopt specific standards with respect to late-filing applicants, and to apply such standards with respect to the option enrollment application of Petitioners, LPS clearly unlawfully discriminated against the Petitioners and violated the procedures of the Enrollment Option Act.

Respondent's Allegations

Respondent alleged in paragraphs 4, 5 and 6 of its answer:

4. Alleges that the Respondent has adopted standards for acceptance and rejection of applications for option enrollment according to and in compliance with Section 79-238 R.R.S., for the 1998-99 school year, and that Petitioners application was not submitted in accordance with such adopted standards or Section 79-237 R.R.S. Further alleges that Respondent has followed the procedures of Sections 79-234 to 79-241 R.R.S., and that Petitioners have not followed such procedures. And alleges that Petitioners application was filed after the deadline, the deadline has not been legally waived as required by Sections 79-234 to 79-241 R.R.S., and the Respondents actions in this matter are proper and should be upheld.

5. Alleges that the Respondent is at capacity in the classes, programs, grade levels and school buildings, or requested attendance, that the classes, programs, grade levels and school buildings to which Petitioners' student would attend in the future are at capacity.

6. Alleges that Section 79-232 et. seq., the funding provisions, and any relief requiring Respondents to approve Petitioners application, is unconstitutional and in violation of Nebraska Constitution Article VIII, Sections 1 and 4, and the Equal Protection and Due Process Clauses of the Nebraska and United States Constitution, that the funding mechanism set forth in said statutes place a discriminatory tax burden on the taxpayers of the option school district, fails to provide compensation to the option school district sufficient to cover the cost of providing educational services to option students, and creates a substantially unequal tax burden for its taxpayers, and that the aforesaid constitutional rights of the Respondent and residents and taxpayers of Respondent would be violated by granting the application referred to in Petitioners' Petition.

Respondent did not offer any evidence in support of the allegations contained in paragraphs 5 and 6 of its Answer.

Respondent has also alleged in paragraph 6 of its Answer that §79-232 *et seq.* is unconstitutional and has requested in the prayer of its Answer that the State Board of Education not only dismiss the Petitioners' Petition but also to declare the Nebraska Enrollment Option Program, *Neb. Rev. Stat. §79-232, et seq.* (Reissue 1996) unconstitutional.

HEARING OFFICER'S CONCLUSIONS OF LAW

The Hearing Officer makes the following Conclusions of Law (and determinations as to mixed questions of fact and law) based on the law, the stipulations of the parties, and the evidence presented during the hearing:

1. That the Petitioners' Appeal was properly perfected pursuant to Nebraska law and proper notice of the 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 in this appeal.
3. The State Board of Education has jurisdiction to review the Respondent's decision rejecting Petitioners' application to transfer to the Respondent's School District for the 1998/99

school year under the Nebraska Enrollment Option Program, §79-232 *et seq.*, *Neb. Rev. Stat.* as amended to date.

4. The State Board of Education has authority *not only* to determine whether the Respondent followed the procedures of §§ 79-234 to 79-241, in rejecting Petitioners' application, but also to determine whether Respondent's rejection of Petitioners' application is contrary to law, not based upon fact and is otherwise improper under the standards set forth in §79-238 *Neb. Rev. Stat.* (R.S. Supp. 1997).

5. The policy statement of intent of the Legislature of the State of Nebraska in enacting the Enrollment Option Program in the State of Nebraska is contained in *Neb. Rev. Stat.* §79-232 (Reissue 1996) and provides in pertinent part as it relates to this appeal:

79-232. Legislative findings. (1) The Legislature hereby finds and declares that parents and legal guardians have the primary responsibility of ensuring that their children receive the best education possible. In recognition of this responsibility, the Legislature intends to provide educational options for parents and legal guardians, when deciding what public school or public school district is best for their children. . .

* * *

Source: Laws 1989, LB 183, §1; Laws 1994, LB 930, §1; Laws 1994, LB 930, §1; R.S. 1943, (1994), § 79-3401; Laws 1996, LB 900, §36.

6. *Neb. Rev. Stat.* §79-243 provides that a "school district shall make information about the school district and its schools, programs, policies, and procedures available to all interested people."

7. The option school district made information about the school district and its schools, programs, policies, and procedures available to all interested people.

8. The option school district's board policy for option enrollment for the 1998-99 school

year was available at each of its school buildings, including the particular elementary school which the Petitioners wanted their child to attend. The Board meeting at which the option enrollment policy adopted was open to the public, reported in the press and televised. (Testimony of Dr. Wild T146:13-147:22).

9. *Neb. Rev. Stat.* §79-237 (Reissue 1996) provides in pertinent part:

79-237. Attendance; application; cancellation; forms.

(1)(a) Except as provided in subdivision (b) of this subsection, for a student to attend school in an option school district, the student's parent or legal guardian shall submit an application to the school board or board of education of the option school district between September 1 and January 1 for enrollment during the following and subsequent school years. **Applications submitted after January 1 shall be accompanied by a written release from the resident school district.** The option school district shall provide the resident school district with the name of the applicant on or before January 15. The option school district shall notify, in writing, the parent or legal guardian of the student, the resident school district, and the State Department of Education whether the application is accepted or rejected on or before April 1.

* * *

(Emphasis added).

Source: Laws 1989, LB 183, § 6; Laws 1990, LB 843, § 7; Laws 1993, LB 348, § 66; Laws 1993, LB 838, § 1; R.S.1943, (1994), § 79-3406; Laws 1996, LB 900, § 41. Effective date July 19, 1996.

10. Petitioners' application, which they submitted to the option school district for the 1998-99 school year, after January 1, 1998, was not "accompanied by a written release from the resident school district" (i.e. Lancaster County School District 145) as required by *Neb. Rev. Stat.* §79-237(1).

11. *Neb. Rev. Stat.* §79-239 provides:

§ 79-239. Application; rejection; notice; appeal.

If an application is rejected by the option school district or by the resident school district, **the rejecting school district shall state in the notification the reason for the rejection.** The parent or legal guardian may appeal a rejection to the State Board of Education within thirty days after the date the notification of the rejection was received by the parent or legal guardian. Such hearing shall be held in accordance with the Administrative Procedure Act and shall determine whether the procedures of sections 79-234 to 79-241 have been followed.

(Emphasis added).

12. The only reason stated in the option school district's notification to Petitioners of the option school district's rejection of Petitioners' enrollment option application for the 1998/99 school year was that it was "filed after deadline." (Exhibit 1 and Exhibit 4). The option school district's Board of Education resolution denying Petitioners' application stated that Petitioner "did not file application with the district within the time designated by the board resolution" (Exhibit 39, p. 7). Therefore, I find that the only reason the Respondent denied Petitioners' application was that the application was filed after January 12, 1998.

13. Respondent was required to follow certain procedures contained in *Neb. Rev. Stat.* §79-238 (Reissue 1996) before it could lawfully reject the Petitioners' enrollment option application for the 1998-99 school year.

14. *Neb. Rev. Stat.* §79-238 required the Board of Education of the Respondent option school district to adopt by resolution specific standards for acceptance and rejection of enrollment option applications for the 1998-99 school year.

15. The Respondent's Board of Education failed to follow the procedures of *Neb. Rev.*

Stat. §79-234 to §79-241, as amended to date, in rejecting Petitioners' application for their daughter, Abigail Newhouse, to attend school in the Respondent Option School District under the Nebraska Enrollment Option Program for the 1998/99 school year for the following reasons:

- a. The evidence shows two occasions where the January 12, 1998, deadline established for the 1998-99 school year has been waived by the option school district's Board of Education. The evidence shows that on those two occasions the option school district's Board of Education by resolution found "unique circumstances" and approved the applications for enrollment in its school district without the resident school district signing the application waiving the January 1, 1998, statutory deadline, and **there is no evidence** in the record that the applications which were submitted after January 1, 1998, to the option school district were accompanied by a written release from the resident school district or by agreement of the school board of board of education of the option school district and the resident school districts that the deadline was waived:
 - (1) Application marked as Exhibit "9", page 11, and acted upon at the 3/24/98 Board meeting marked as Exhibit "42" – "unique circumstances" involving a private school student who needed one class and the class scheduling was not available until after January 12; and
 - (2) Application marked as Exhibit "9", page 15, and acted upon at the 4/28/98 Board meeting marked as Exhibit "43" – "unique circumstances" involving a child who is the sibling of a student **currently** enrolled at LPS.
- b. The evidence shows that Respondent's Board of Education failed to adopt by resolution specific standards for the acceptance and rejection of late-filed applications for the 1998-99 school year and apply such standards to Petitioners' application.

16. The Hearing Officer finds as a matter of law that the Petitioners had the burden of

proof to prove by clear and convincing evidence that the Respondent failed to follow the procedures of *Neb. Rev. Stat.* §779-234 to §79-241, as amended to date, in rejecting Petitioners' application for their child to transfer to the Respondent Option School District for the 1998/99 school year under the Enrollment Option Program and the Petitioners so proved.

17. Financial compensation to the option school district is not a standard authorized by *Neb. Rev. Stat.* §79-238 (R.S. Supp. 1997) for acceptance and rejection of enrollment option applications under the Nebraska Enrollment Option Program.

18. The State Board of Education does not have jurisdiction to declare the Nebraska Enrollment Option Program, *Neb. Rev. Stat.* §79-232 *et seq.*, as amended to date, or its enforcement unconstitutional. *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992); *Calabro v. City of Omaha*, 247 Neb. 955, 530 N.W.2d 925 (1995) (citing *Transport Workers of America v. Transit Auth. of Omaha*, 205 Neb. 26, 34, 286 N.W.2d 102, 107 (1979)).

19. There is no evidence in the record that the resident school district has a desegregation plan adopted by their Board of Education or ordered by the federal court, as provided in *Neb. Rev. Stat.* §79-237. Therefore, the Petitioners were **not** required to submit an application to the school board or board of education of the resident school district between September 1 and January 1 for enrollment in the option school district in the 1998/99 school year and following years.

20. The question as to whether the resident school district failed to follow the procedures of *Neb. Rev. Stat.* §§79-234 to 79-241 is not properly before the Hearing Officer, since, I have not been appointed to hear the same and said school district is not a party to this appeal.

RECOMMENDATION

The following is the recommendation of the Hearing Officer:

1. That the State Board of Education find that the Petitioners' appeal was properly perfected pursuant to Nebraska law and proper notice was given to all parties.
2. That the State Board of Education find that at all times relevant the State Board of Education had jurisdiction over the subject matter and the parties.
3. That the State Board of Education find that it has jurisdiction to review the Respondent's decision rejecting Petitioners' application to transfer to the Respondent's School District for the 1998/99 school year under the Nebraska Enrollment Option Program, *Neb. Rev. Stat. §79-232 et seq.* as amended to date.
4. That the State Board of Education find that its jurisdiction to review decisions rejecting applications to transfer under the Nebraska Enrollment Option Program, *§79-232 et seq., Neb. Rev. Stat.* as amended to date, goes beyond determining whether the procedures of §§ 79-234 to 79-241 have been followed, that is whether the rejections comply with other requirements of the law.
5. That the State Board of Education find that the State Board of Education has authority not only to determine whether the Respondent followed the procedures of §§ 79-234 to 79-241, in rejecting Petitioners' application, but also to determine whether Respondent's rejection of Petitioners' application is contrary to law, not based upon fact and is otherwise improper under the standards set forth in *§79-238 Neb. Rev. Stat. (R.S. Supp. 1997)*.
6. That the State Board of Education find as a matter of law that the Petitioners had the burden of proof to prove by clear and convincing evidence, that the option school district failed to follow the procedures of the Nebraska Enrollment Option Program in rejecting Petitioners'

application for transfer of their child to the option school district for the 1998/99 school year and the **Petitioners so proved.**

7. That the State Board of Education find that the Respondent's Board of Education failed to follow the procedures of *Neb. Rev. Stat.* §79-234 to §79-241, as amended to date, in rejecting Petitioners' application for their daughter, Abigail Newhouse, to attend school in the Respondent option school district under the Nebraska Enrollment Option Program for the 1998/99 school year.

8. That the State Board of Education deny Respondent's Motion for a Directed Verdict made during the hearing.

9. That the State Board of Education sustain Petitioners' appeal.

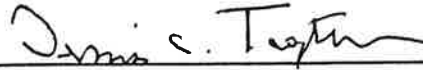
10. That the State Board of Education order the Respondent to approve the Petitioners' application for transfer of their daughter, Abigail Newhouse, to the option school district for the 1998/99 school year, in accordance with *Neb. Rev. Stat.* §79-235.

11. That the State Board of Education order that any Finding of Fact which is more properly considered a Conclusion of Law shall be so construed. Alternatively, any Conclusion of Law which is more appropriately considered as a Finding of Fact shall be so construed.

12. That the State Board of Education as part of its Order, adopt the Hearing Officer's Findings of Fact and Conclusions of Law in all respects and that such be made a part of its Order by reference to the same extent and like effect as though such Findings of Fact and Conclusions of Law were fully set forth verbatim in its Order.

DATED this 30th day of July, 1998.

Respectfully submitted,
Dennis C. Tegtmeier, Hearing Officer



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation was mailed by United States certified mail, return receipt requested, postage prepaid to the parties or their attorneys on the 18th day of July, 1997:

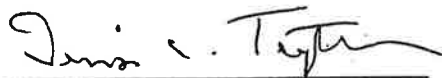
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Dennis C. Tegtmeier, Hearing Officer

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

NORMAN NEWHOUSE and IRENE
NEWHOUSE, parents of ABIGAIL L.
NEWHOUSE,
6521 Perry Circle
Lincoln, Nebraska 68516

Petitioners,

vs.

SCHOOL DISTRICT 0001 OF
LANCASTER COUNTY, NEBRASKA,
a/k/a LINCOLN PUBLIC SCHOOLS
5901 "O" Street
P.O. Box 82889
Lincoln, Nebraska 68501-2889,

Respondent.

No. 98-03

ORDER IN COMPLIANCE
WITH COURT ORDER

This matter came before the State Board of Education on June 11, 1999, on the Motion of the Respondent that the State Board of Education enter an order in compliance with the Order of the District Court of Lancaster County, Nebraska dated May 14, 1999, so as to reverse the Order of the State Board of Education in the above captioned case, dated August 14, 1998, and reinstate the decision of the Board of Education of Lancaster County School District 0001, a/k/a Lincoln Public Schools to deny the option enrollment of the Petitioners herein. As directed by the District Court of Lancaster County, the decision of the Board of Education of Lancaster County School District 0001 is reinstated.

Additionally, the Respondent school district's attention is directed to the requirement for the adoption by resolution of specific standards for acceptance or rejection of applications pursuant to Section 79-238 of the Revised Statutes of Nebraska, and to the requirement to make information about such policies and procedures available to all interested people, pursuant to Section 79-243 of the Revised Statutes of Nebraska.

Dated this 11th day of June, 1999.



Bev Peterson, President
State Board of Education

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Order** was mailed or delivered to the following persons by regular first-class United States mail, postage-prepaid, on this 11th day of June, 1999:

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COPY

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

SCHOOL DISTRICT 0001 OF)
LANCASTER COUNTY, NEBRASKA,)
a/k/a LINCOLN PUBLIC SCHOOLS,)
5901 "O" Street)
P.O. Box 82889)
Lincoln, Nebraska 68501-2889)

Docket 574

Page 294

Petitioner,

v.

ORDER

NORMAN NEWHOUSE AND IRENE)
NEWHOUSE, parents of ABIGAIL)
NEWHOUSE,)
6521 Perry Circle)
Lincoln, Nebraska 68516)

Respondents.

This case came on for hearing on the merits of appeal on February 19, 1999. Attorney Gregory H. Perry was present for the petitioner. Neal Stenberg was present for respondents. Hearing was held, Exhibit 1 was received into evidence and the matter was argued and submitted on briefs to the Court. The Court now being fully advised, finds and orders as follows:

This appeal involves a late-filed application for enrollment in Lincoln Public Schools under the enrollment option program.

The enrollment option program allows parents to file an application to enroll their child in a public school in which they do not reside. See Neb. Rev. Stat. §§ 79-232 to 79-246. Cf., Neb. Rev. Stat. § 79-215(1) (a nonresident student otherwise may attend school only if she pays tuition in advance). The deadline to file an option enrollment application is **January 1** for enrollment in the



following school year. Neb. Rev. Stat. §79-237(1)(a). Applications filed after this statutory deadline are required to "be accompanied by a written release from the resident school district." *Id*

The Board of Education of Lincoln Public Schools (hereinafter "School Board") adopted a policy which established standards for the acceptance and rejection of enrollment option applications in the 1998-99 school year. The policy, among other things, required option enrollment applications to be filed by at least **January 12, 1998**. It also required "[t]he option enrollment student otherwise meet all statutory or legal conditions or requirements for option enrollment." Exhibit "7," pages 6-7. See Neb. Rev. Stat. § 79-238(l) (school boards are directed and authorized to establish standards for the acceptance and rejection of option enrollment applications).

The Newhouses live in Lancaster County School District 145, which is sometimes referred to as the Waverly Public School District. They wanted to enroll their daughter, Abigail, in the Lincoln Public School District beginning in the 1998-99 school year. Mrs. Newhouse filed an option enrollment application for this purpose with the Lincoln Public Schools. She did not file it, however, until **February 2, 1998**. Also, the application was not accompanied by a written release from Lancaster County School District 145. The Newhouses' application was rejected by the School Board on February 24, 1998.

The Newhouses appealed the School Board's rejection of their option enrollment application to the State Board of Education ("State Board") pursuant to Neb. Rev. Stat. § 79-239. On appeal, the State Board reversed the School Board's decision and ordered it to approve the Newhouses' late-filed option enrollment application. The State Board ruled as follows:

6. The State Board of Education finds as a matter of law that the [Newhouses] had the burden of proof to prove by clear and convincing evidence, that the option school district failed to follow the procedures of the Nebraska Enrollment Option

Program in rejecting [the Newhouses'] application for transfer of their child to the option school district for the 1998/99 school year and the [Newhouses] so proved.

7. The State Board of Education finds that the [Lincoln Public School's] Board of Education failed to follow the procedures of Neb. Rev. Stat. § 79-234 to § 79-241, as amended to date, in rejecting [the Newhouses'] application for their daughter, Abigail Newhouse, to attend school in the [Lincoln Public School] option school district under the Nebraska Enrollment Option Program for the 1998/99 school year.

Volume I at 252 (bold in original). The State Board based these conclusions entirely on the fact that the School Board had approved two other late-filed applications after the School Board had rejected the Newhouses' application. This is evident from the fact that the State Board gave no other explanation for its decision, but instead adopted the findings of its Hearing Officer which stated:

15. The Respondent's Board of Education failed to follow the procedures of Neb. Rev. Stat. § 79-234 to § 79-241, as amended to date, in rejecting Petitioners' application for their daughter, Abigail Newhouse, to attend school in the Respondent Option School District under the Nebraska Enrollment Option Program for the 1998/99 school year for the following reasons:

- a. Tthe [sic] evidence shows two occasions where the January 12, 1998, deadline established for the 1998-99 school year has been waived by the option school district's Board of Education. The evidence shows that on those two occasions the option school district's Board of Education by resolution found "unique circumstances" and approved the applications for enrollment in its school district without the resident school district signing the application waiving the January 1, 1998, statutory deadline, and there is no evidence in the record that the applications which were submitted after January 1, 1998, to the option school district were accompanied by a written release from the resident school district or by agreement of the school board of board of education of the option school district and the resident school districts that the deadline was waived:
- (1) Application marked as Exhibit "9", page 15, and acted upon at the 3/24/98 Board meeting marked as Exhibit "42" - "unique circumstances" involving a private school student who

needed one class and the class scheduling was not available until after January 12; and

- (2) Application marked as Exhibit "9", page 15, and acted upon at the 4/28/98 Board meeting marked as Exhibit "43" - "unique circumstances" involving a child who is the sibling of a student **currently** enrolled at LPS.
- b. The evidence shows that Respondent's Board of Education failed to adopt by resolution specific standards for the acceptance and rejection of late-filed applications for the 1998-99 school year and apply such standards to Petitioners' application.

Volume I at 235-36 (bold in original).

FACTS

The Court finds that the facts are as set forth in the Hearing Officer's Findings of Fact as follows:

1. The Newhouses reside in Lancaster County School District 145 (the "resident school district"). Mrs. Newhouse filed an option enrollment application to have her daughter, Abigail, (DOB 2/12/93) attend Lancaster County School District 0001, a/k/a Lincoln Public Schools (the "option school district"). The application was for enrollment in the 1998-99 school year, at which time Abigail will be at the kindergarten grade level. (Exhibit "I"). The application was filed on February 2, 1998. The application was not accompanied by a written release from the resident school district as prescribed by Neb. Rev. Stat. § 79-237 for applications submitted after the statutory deadline of January 1, 1998.

2. January 1, 1998, was the statutory deadline for submitting applications to the option school district for enrollment in the option school district for the 1998-99 and subsequent school years. See Neb. Rev. Stat. § 79-237.

* * *

3. On December 16, 1997, the Board of Education of the option school district adopted a resolution which established a January 12, 1998, deadline for option enrollment applications for the 1998-99 school year. The Resolution reads as follows:

BE IT RESOLVED that the Lincoln Public Schools shall accept K-12 option enrollment students for the 1998-99 school year on the condition that the filing deadline will not be waived and that:

A. The option enrollment application is received by January 12, 1998;

B. The option enrollment student otherwise meets all statutory or legal conditions or requirements for option enrollment and attends Lincoln Public Schools on a full-time basis; and,

C. Except as otherwise required by law, that all programs, classes and buildings of assignment shall at all times and from time to time during attendance at Lincoln Public Schools be determined by Lincoln Public Schools.

Exhibit "37", pp. 6-7.

* * *

13. The option school district's Board policy for option enrollment for the 1998-99 school year was available at each of its school buildings, including the particular elementary school which the [Newhouses] wanted their child to attend. The Board meeting at which the option enrollment policy adopted was open to the public, reported in the press and televised. (Testimony of Dr. Wild (T146:13-147:22))

14. On February 24, 1998, the Board of Education of the option school district adopted a motion, by a unanimous (6-0) vote, to disapprove Abigail Newhouse[s] option enrollment application for the 1998-99 school year. [Exhibit "39" p.7; the Board resolution stated the rejection was made because the student "did not file application with this district within the time designated by the board resolution"]. The stated reason [given on the application form] for rejecting the application was that it was "filed after deadline." (Exhibit "1"). Option enrollment applications for other late-filed applications were also disapproved. (Exhibit "39").

* * *

16. The disapproval of Abigail Newhouse's application was consistent with the option enrollment policy which had been adopted by the Board of Education of the option school district for the 1998-99 school year. (Exhibit 27, pp. 6-7). However, the evidence shows two occasions where the January 12, 1998, deadline established

for the 1998-99 school year has been waived by the option school district's Board of Education. The evidence shows that on those two occasions the option school district's Board of Education by resolution found "unique circumstances" and approved the applications for enrollment in its school district without the resident school district signing the application waiving the January 1, 1998, statutory deadline, and there is no evidence in the record that the applications which were submitted after January 1, 1998, to the option school district, were accompanied by a written release from the resident school district or by agreement of the school board or board of education of the option school district and the resident school districts that the deadline was waived:

(1) Application marked as Exhibit "9", page 11, and acted upon at the 3/24/98 Board meeting marked as Exhibit "42" - "unique circumstances" involving a private school student who needed one class and the class scheduling was not available until after January 12; and

(2) Application marked as Exhibit "9", page 15, and acted upon at the 4/28/98 Board meeting marked as Exhibit "43" - "unique circumstances" involving a child who is the sibling of a student **currently** enrolled at LPS.

(Note, that another application was administratively marked as approved, but the Board minutes in regard to that application show that the Board did not act to approve that application, which involved another sibling situation. *See* Exhibit "9" page 7 (Student No. 163223) and Exhibit "38", p. 7). No sibling of Abigail currently attends LPS, and she is not a private high school student seeking to take one class.

Volume I at 209-213 (bold in original).

FINDINGS

This Court's standard of review is de novo on the record of the agency pursuant to Neb. Rev. Stat. § 84-917(5)(a).

The Newhouses' appeal to the State Board of Education was pursuant to Neb. Rev. Stat. § 79-239 which provides:

Application; rejection; notice; appeal. If an application is rejected by the option school district or by the resident school district, the rejecting school district shall state in the notification the reason for the rejection. The parent or legal guardian may appeal a rejection

to the State Board of Education within thirty days after the date the notification of the rejection was received by the parent or legal guardian. Such hearing shall be held in accordance with the Administrative Procedure Act and shall determine whether the procedures of sections 79-234 to 79-241 have been followed.

The Board of Education of the Lincoln Public Schools did adopt standards on December 16, 1997, for the acceptance and rejection of open enrollment option applications. Those standards required that applications be timely filed and meet statutory requirements which would include the requirement that applications filed after January 1st be accompanied by a written release from the resident school district. The School Board rejected six applications, including the Newhouses' application, which had failed to meet the standards. However, the School Board approved two applications which did not meet the standards, but which involved "unique circumstances".

Before the State Board of Education (State Board), the Newhouses claimed that they had been denied equal protection of the law by the School Board enforcing its standards against them, but not enforcing its standards against the two applications which were granted. The Court now finds that the Newhouses were not denied equal protection of the law since the Newhouses were not similarly situated to the two approved applicants.

The State Board went beyond the claims raised by the Newhouses and concluded that the School Board's failure to enforce its standards as against two applicants invalidated, amended or repealed the School Board's standards. The State Board concluded that the School Board had no standards and had, therefore, failed to "follow the procedures" of the statutes when it denied the Newhouses' application.

The failure to enforce the application filing deadline and the resident school district waiver requirements, in regard to other late filed applications, did not invalidate, amend or repeal the School

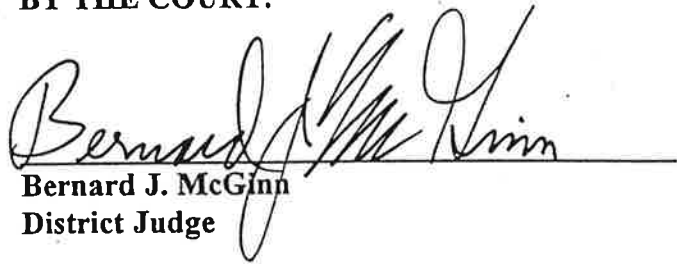
Board's option enrollment policy, or state law. See *In Re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994) and *Busse Broadcaster Corp. v. FCC*, 87 F.3rd 1456 (D.C. 1996).

The Newhouses' claim, that they were given false information and thereby entitled to have their application approved, is not supported by the record.

WHEREFORE, it is the order of the Court that the decision of the State Board of Education dated August 14, 1998, which reversed the decision of the Board of Education of Lancaster County rejecting the Newhouses' application for option enrollment for the 1998-99 school year, is hereby reversed and this matter is remanded to the State Board of Education with directions to reinstate the decision of the Board of Education of Lancaster County. Costs of this appeal are to be paid by respondents.

DATED AND SIGNED this 14th day of May, 1999.

BY THE COURT:


Bernard J. McGinn
District Judge

cc *Gregory H. Perry*, Attorney for Petitioner
Neal Stenberg, Attorney for Respondents