

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

	)	
	)	
	)	CASE NO. 19-08
	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	<b>FINAL ORDER</b>
	)	
NORTHWEST PUBLIC SCHOOLS	)	
2710 N. North Road	)	
Grand Island NE 68803	)	
	)	
Respondent.	)	

Petitioner filed this appeal pursuant to Neb. Rev. Stat. § 79-239 (R.R.S. 2014) and Title 92, NAC, Chapter 61, effective October 1, 1997. Petitioner requests that the State Board of Education reverse the Respondent School District’s decision rejecting the application filed by Petitioner to enroll . in the Northwest Public Schools for the 2019-2020 school year.

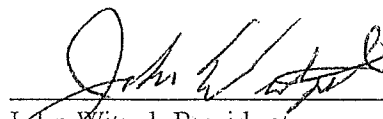
The State Board of Education, having considered the record in the case and the Hearing Officer’s Proposed Findings of Fact, Recommended Conclusions of Law and Recommended Decision, and having been fully advised in the matter, finds that it should adopt and incorporate by reference in its Order as its 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 Northwest Public Schools' decision to reject Petitioners' previously accepted option enrollment application is affirmed and the Petitioner's appeal to this Board is denied.

Dated this 9<sup>th</sup> day of August, 2019.

NEBRASKA STATE BOARD OF EDUCATION



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John Witzel, President  
State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 19-08 on August 9, 2019, was 7 in favor, 1 against, 0 abstaining, and 0 absent.

Individual State Board members voted as follows:

IN FAVOR: P KOCH JOHNS, L FRICKE, J WITZEL, P TIMM, M NICKELS, R STEVENS,

D NEARY

AGAINST:

R WISE

ABSTAINING:

ABSENT:

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon  
and Northwest Public Schools, 2710 N.  
North Road, Grand Island, NE 68803 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 9<sup>th</sup> day of August, 2019.

Brenda L. Wid

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

CASE NO. 19-08

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) HEARING OFFICER'S PROPOSED  
) FINDINGS OF FACT, CONCLUSIONS OF  
Petitioner, ) LAW AND RECOMMENDED DECISION  
)  
vs. )  
)  
NORTHWEST PUBLIC SCHOOLS, )  
2710 N. North Road )  
Grand Island, NE 68803 )  
)  
Respondent. )

INTRODUCTION

Petitioner has filed this appeal, pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2014), and Title 92, NAC, Chapter 61. Petitioner requests that the State Board of Education reverse the Respondent School District's decision rejecting the application filed by Petitioner to enroll in the Northwest Public Schools for the 2019-20 school year.

The hearing on this matter was convened pursuant to notice at the Northwest Public School's Administrative offices in Grand Island at about 9:30 a.m. on July 11, 2019 before Jim R. Titus, Hearing Officer, appointed by the State Board of Education. Petitioner appeared pro se through Respondent appeared pro se through its superintendent Dr. Jeffrey Edwards. The hearing was recorded by Precision Reporting, Inc. of Lincoln, Nebraska.

The hearing was conducted pursuant to the Nebraska Department of Education Rules of Practice and Procedure for hearings in contested cases before the Department of Education, Title 92, NAC, Chapter 61. Ryan O'Grady, Director of Student Services, Dr. Jeffrey Edwards, Superintendent and Jeffrey W. Ellsworth, Chapman School principal testified. Seven exhibits

were offered and received without objection, namely:

- Exhibit 1: Letter to Nebraska State Board of Education with attachments from [redacted] dated 6/7/19
- Exhibit 2: Certificate of Service for Petition filed 6/17/19
- Exhibit 3: Letter from Nebraska Department of Education to [redacted] dated 6/14/19
- Exhibit 4: Assignment of Case to Hearing Officer filed 6/17/19
- Exhibit 5: School District's Option Enrollment Policy
- Exhibit 6: Email from [redacted] dated February 26, 2019
- Exhibit 7: Email from [redacted] April 8, 2019

Having considered the exhibits and testimony 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. [redacted] is the mother of [redacted]. She has one child in Chapman School 4<sup>th</sup> grade and one child in preschool at Chapman, which is a part of the Respondent school district.
2. Northwest Public Schools is a school district as defined by Neb. Rev. Stat. § 79-101(1).
3. On or about April 9, 2019, [redacted] submitted for [redacted] an Application for Student Transfer Nebraska Enrollment Option Program to Respondent to attend Chapman elementary school.
4. The application was timely rejected on May 29, 2019 by a letter included in Exhibit 1 page 5 for the reason that the school district was at capacity in their special education

program.

5. Petitioner appealed the decision of the Respondent by letter dated June 14, 2019.

6. Petitioner's appeal included a letter from Mr. Ellsworth, principal of Chapman School that they did have capacity in their special education program at Chapman School. He repeated such belief at the hearing. However, after testimony from Dr. O'Grady, the principal admitted he was not aware that there were more special education students coming into the district by residency and that resources that he believed he had available could be shifted to meet needs at other schools in the district.

7. Mr. Ellsworth also testified that he had seen lists to the resident school district that appeared to indicate that [redacted] had been accepted as an option student, but such documentation was not offered at the hearing and so the context and basis for his understanding could not be determined.

8. Dr. O'Grady testified that Chapman has a substantial number of special education students and were to be sent another full time resource teacher, but that at the district level they had to look at the entire district, which includes schools 15 to 20 miles apart, and that placement of special education resources is fluid and subject to movement among schools as they gain a better data of the needs at each school. Due to additional special education students moving into the district, the additional resources at Chapman may change.

9. Dr. Edwards testified that the district is at capacity in the special education program, which Respondent's policy provides may be determined at a district level. He also testified that the application lacked a waiver by the resident school district for a late filed application.

10. Respondent has adopted specific standards for acceptance and rejection of

applications for option students. Exhibits 6 and 7 only show that the school district is willing to reconsider acceptance if the program capacity changes in time, but is not applicable to this case.

#### RECOMMENDED CONCLUSIONS OF LAW

11. Petitioner perfected 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.

12. 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.

13. Neb. Rev. Stat. § 79-238 (1) (Cum. Supp. 2018) 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.

14. The Petitioner did not meet the March 15, 2012 deadline for the application for

option enrollment as required by Neb. Rev. Stat. §79-237(1). The reason for the untimely filing does not fall within the exception under the policy adopted by the Respondent and there was no waiver provided by the resident school district.

15. Respondent's policies provide for the rejection of an application for lack of capacity in a program.

16. The State Board of Education has consistently held in such appeals that in order for 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.

17. 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). Petitioner did not raise the issue of or present evidence on the district's determination of its program capacity, relying instead the principal's belief that the additional special education resources he expected would be provided.

18. However, the Respondent makes its determination at the district level, taking into consideration that resources may need to be reallocated between schools as it becomes clear the number of additional resident special education students. Priority for enrollment to siblings of option students is subject to the determination that the school district is at capacity in a program



pursuant to Neb. Rev. Stat. § 79-238 (3) (Cum. Supp. 2018)

19. There is no basis for a determination that the procedures of Neb. Rev. Stat. §§ 79-234 to 79-241 (Reissue 2014), nor any other requirements of law, were not followed by the Respondent school district in this rejection of Petitioner's application. Therefore, the determination of the Respondent school district in rejecting the application for option enrollment should be affirmed.

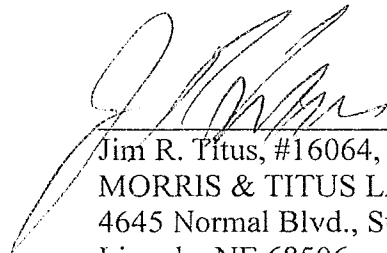
RECOMMENDED DECISION

The following is recommended by the Hearing Officer:

(a) That the Respondent School District's decision to reject Petitioner's previously accepted 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 19<sup>th</sup> day of July, 2019.

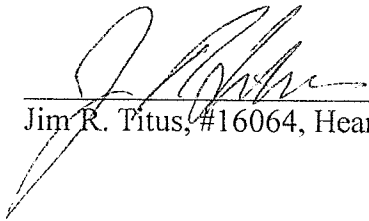


Jim R. Titus, #16064, Hearing Officer  
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Lincoln, NE 68506  
(402) 434-5200 – phone  
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[jtitus@morristituslaw.com](mailto:jtitus@morristituslaw.com)

CERTIFICATE OF SERVICE

The undersigned, Jim R. Titus, hereby certifies that the original of the foregoing with attached transcript was served by first-class United States mail, postage prepaid to Scott Summers, General Counsel, Nebraska Department of Education, P.O. Box 94987, Lincoln, Nebraska, 68509 on July 12, 2019, and a true and correct copy of the foregoing was served by email on July 19, 2019 to the following parties:

Dr. Jeff Edwards, Superintendent  
Northwest Public Schools  
2710 N. North Road  
Grand Island, NE 68803  
[jedwards@ginorthwest.org](mailto:jedwards@ginorthwest.org)

  
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Jim R. Titus, #16064, Hearing Officer