

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

)	
)	
)	CASE NO. 19-19
)	
)	
)	
)	
Petitioners,)	
)	
v.)	FINAL ORDER
)	
DESHLER PUBLIC SCHOOLS)	
1402 Third Street)	
P. O. Box 547)	
Deshler, NE 68340)	
)	
Respondent.)	

Petitioner filed this appeal pursuant to Neb. Rev. Stat. § 79-239 (R.R.S. 2014) and Title 92, NAC, Chapter 61, effective October 1, 1997. Petitioner requests that the State Board of Education reverse the Respondent School District’s decision to deny Petitioner’s application to option enroll their child, _____ in the Deshler 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, except as follows:

1. Finding of Fact 6 and 12: The State Board does not find that the record supports a finding that *the Respondent established* that its special education program was at or over capacity for this case nor that Respondent’s Superintendent Dr. Meier *established* this. There is no

evidence in the record that: (i) the Respondent set a specific capacity of the special education program for purposes of option enrollment that set a maximum number of option students that it would accept into that program as described in *Neb. Rev. Stat. §79-238(1)*; or (ii) that the Respondent's board adopted a resolution declaring that the special education program was unavailable to option students due to lack of capacity as described in *Neb. Rev. Stat. §79-238(1)*.

The State Board further finds that the evidence in the record concerning the capacity determination in this case was limited to: (i) Respondent's Option Enrollment Policy, (Exhibit 101); (ii) the Respondent Superintendent's testimony that "Deshler Public Schools" had determined that its special education program was at capacity with no number of students testified to; (iii) a roster of students enrolled that have special education Individual Education Plans, (IEPs) at Respondent's schools dated August 29, 2019, which was 23 days after Respondent rejected Petitioner's option enrollment application for capacity, , (Exhibit 105); and (iv) testimony from Respondent's Superintendent about the student numbers and staff and fiscal issues concerning enrollment of additional special education students. This evidence does not support a conclusion that the Respondent was at capacity for its Special Education Program on August 6, 2019, as capacity is to be determined by school district boards under *Neb. Rev. Stat. §79-238(1)* as described in the paragraph above nor under Respondent's own Option Enrollment Policy as identified in paragraphs A, B5, B6, or C1 of the transcript.

However, in accord with previous Orders of the State Board in enrollment option cases, and as described in the Hearing Officer's Recommended Conclusions of Law in this case, in order for

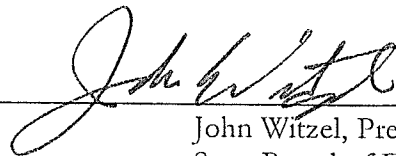
Petitioner's to prevail, *they* have the burden to prove by a preponderance of the evidence that the Respondent school district failed to follow the procedures of the Nebraska enrollment option program in denying their application. While a capacity determination is subject to challenge as unreasonable or arbitrary, the party who raises that issue has the burden of proving the facts show that such a determination was made in an unreasonable and arbitrary manner. In this case, the Petitioners did not raise the issue of the capacity determination either in the Petition or at hearing. Instead, Petitioners relied on their belief that the student no longer needed special education services.

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 *except* findings numbers six (6) and twelve (12), 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 Deshler Public Schools' decision to deny the Petitioners' enrollment option application is affirmed and the Petitioner's appeal to this Board is denied.

Dated this 8 day of November, 2019.

NEBRASKA STATE BOARD OF EDUCATION



John Witzel, President
State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 19-19 on November 8, 2019, was 8 in favor, _____ against, _____ abstaining, and _____ absent.

Individual State Board members voted as follows:

IN FAVOR:

P. Timm, D. Neary, R. Wise, J. Witzel, M. Nickels, P. Koch Johns

R. Stevens

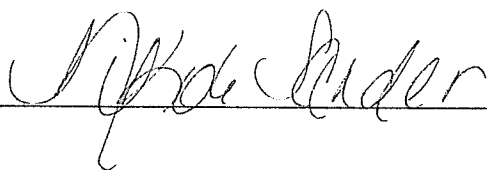
AGAINST:

ABSTAINING:

ABSENT:

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon
Dr. Al Meier, Superintendent, Deshler
Public Schools, P. O. Box 457, Deshler, NE 68340; Greg Perry, Esq., Perry, Guthery, Haase &
Gessford, P.C., L.L.O., 233 S. 13th Street, Ste 1400, Lincoln, NE 68508; 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, 6th floor, Lincoln, NE, on this 12th day of
November, 2019.



Breann Haney (Secondary Principal) and Bonnie Noel (Math and Technology Instructor) testified. Exhibit 2, the rules of procedure for special education cases, was not received. Sixteen exhibits were offered and received, namely:

- Exhibit 1: Student report card
- Exhibit 3: IDEA part B Parents' Rights in Special Education
- Exhibit 4: Individual Education Plan 1/8/19 to 1/7/20
- Exhibit 5: Letter dated 2/12/02
- Exhibit 6: Nebraska Certificate of Title
- Exhibit 7: School District boundaries
- Exhibit 101: Deshler Board Policy Option Enrollment
- Exhibit 102: Application for Student Transfer dated 8/6/19
- Exhibit 103: Application for Student Transfer dated 8/12/19
- Exhibit 104: Letter dated 8/29/19 and Application for Student Transfer 8/12/19
- Exhibit 105: Roster dated 8/29/19
- Exhibit 106: Annual Estimate of Receipts and Expenditures for Fiscal Year 2019-2020
- Exhibit 107: Teacher Certification re Alois Meier
- Exhibit 108: Teacher Certification re Breann Haney
- Exhibit 109: Teacher Certification re Bonnie Noel
- Exhibit 113: Nebraska Department of Education Rule 61

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. are the parents of

2. Deshler Public Schools is a school district as defined by Neb. Rev. Stat. § 79-101(1) (Cum. Supp. 2018).

3. On or about August 6, 2019 and August 12, 2019, submitted Applications for Student Transfer Nebraska Enrollment Option Program to Respondent. The questions on the form that asked whether the student required special education services and whether the student has an Individualized Education Program (IEP) were both marked 'yes' on the first application, then "no, dropping" on the second application.

4. The first application was denied on August 6, 2019 and the second application was denied by letter dated August 29, 2019 by letter to the Respondent.

5. The appealed the denial of the first application by letter dated August 12, 2019, prior to the denial of the second application. stated reasons in their appeal letter were a) that Dr. Meier said if they dropped 's IEP that could attend; b) they do not feel that Thayer Central provides enough services to IEP students; and c) that they were told that their home they moved into August 5, 2019 was in the Deshler school district prior to building, but they have since found they are one fourth mile away from the district boundary.

6. Respondent established that their special education program was at or over capacity.

7. testified that they filed the second application because to enroll in the Respondent school district they had decided to drop any request for special education services, that they believed their student did not need them, and they wanted to permanently decline special services. They offered to pay for private tutors if their needed help.

8. The most recent IEP for 1/8/2019 to 1/7/2020 at Exhibit 4, pages 5 and 13 show the disabilities needing special education services and that the student would need 45 minutes per day five times per week for special education services and 30 minutes per week for

paraprofessional services. Exhibit 1 is a recent report card for the student showing him to be mainly an A and B student, but this was while under the IEP, so no indication of grades in the absence of such services.

9. A student who declines special education services may later demand such services, which the school district must provide and cannot then dismiss the student from its district. Parents and the student are not bound by the parents' agreement to not seek special education services.

10. The alleged statement that the superintendent offered to take their student is not credible. Rather it appears to be a misinterpretation of a statement that if there was no IEP the application would have been granted. This later statement was testified to by Dr. Meier and was overheard being said by the superintendent to the on the telephone by Ms. Noel.

11. Respondent has adopted specific standards for acceptance and rejection of applications for option students.

12. Dr. Meier established that the Respondent was at capacity for special education students and had not accepted students on option enrollment with an IEP for the last two years for that reason, but prior to that had accepted students with an IEP.

RECOMMENDED CONCLUSIONS OF LAW

13. 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.

14. 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.

15. 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.

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

17. The proximity of Petitioner's home to the district's boundary is not an exception to the Respondent's policy on option enrollment.

18. 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.

19. 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 on their belief that the student no longer needed services, but if did, they would provide it privately.

20. However, the student or parents may change their minds at any time and request special education services, which the school district would be required to provide.

21. There is no basis for a determination that the procedures of Neb. Rev. Stat. §§ 79-234 to 79-241, nor any other requirements of law, were not followed by the Respondent school district in their denial of Petitioners' application. Therefore, the determination of the Respondent school district in denying these applications for option enrollment should be affirmed.

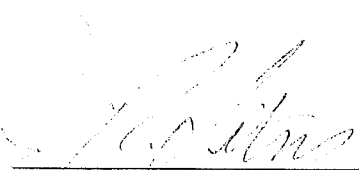
RECOMMENDED DECISION

The following is recommended by the Hearing Officer:

(a) That the Respondent School District's decision to deny Petitioners' option enrollment applications 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 October 30 2019.



Jim R. Titus, #16064, Hearing Officer
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Lincoln, NE 68506

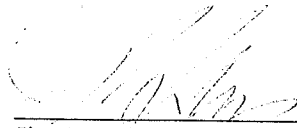
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CERTIFICATE OF SERVICE

I certify that on October 30, 2019, I served a true and correct copy of the foregoing by first-class United States mail, postage prepaid and/or by email on the following:

Al Meier, Superintendent
Deshler Public Schools
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al.meier@deshlerdragons.org

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Jim R. Titus, #16064, Hearing Officer