BEFORE THE STATE BOARD OF EDUCATION

STATE OF NEBRASKA

Petitioner,	)	CASE NO. 20-13
	)	**FINAL ORDER**
WILBER-CLATONIA PUBLIC SCHOOLS Raymond Collins, Superintendent P O BOX 487, 900 South Franklin Street Wilber NE 68465,	)	
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 Wilber-Clatonia Public Schools for the 2020-21 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 to the extent provided below. The State Board finds that it should not adopt the Hearing Officer's Recommended Decision for the reasons described below,

The State Board adopts and incorporates by reference in its Order the Hearing Officer's Conclusions of Law paragraphs 10 - 17. The State Board rejects recommended Conclusions of Law paragraph 18. Instead, the Board adopts the following Conclusion of Law:

As stated in paragraph 15 of the Hearing Officer's recommendations and in Neb. Rev. Stat. § 79-239 (R.R.S. 2014), this Board is to "determine whether the procedures of sections 79-234 to 79-241 have been complied with." They were not in this case. This is stated in the Hearing Officer's recommended finding at paragraph 8 which this Board adopts. Neb. Rev. Stat. § 79-237 (R.R.S. 2014) was not complied with by the Respondent district because it notified neither the Petitioners nor the resident district in writing on or before April 1, 2020, whether or not the application was accepted or rejected, nor did they ever notify the resident district of the name of the enrollment option applicant.

The statute clearly calls for decisions to be made by the option district and communicated to the applicant and resident district in writing by no later than April 1. While the record established that a decision at that time would have been a denial, it is nonetheless not in compliance with the statute to take no action by that date, which is what the Respondent did, albeit for reasons that may have been an effort to benefit the Petitioners. Further, in the spirit of working with the Petitioners that Respondent adduced much evidence about in this case, Respondent could have complied with the law by denying the application on April 1, 2020 by written notice to the Petitioners and resident district, then communicated with Petitioners later should district residents have moved out of the district or indicated that they would attend elsewhere in the 2020-2021 school year just as Respondent stated it was doing here, and allow another application by Petitioners to option into the district. While this would require the resident district to agree to or release the Petitioner's child under Neb. Rev. Stat. § 79-237(1) (R.R.S. 2014), the State Board finds that the Respondent district's actions in this case that did not afford and would not have afforded the resident district the law's intended notice for planning purposes anyway. With no notice to the resident district of any decision or even that the Petitioners had applied by April 1 as required by Neb. Rev. Stat. § 79-239 (R.R.S. 2014), the Respondent purports that it would have acted to approve the option application should the enrollment numbers have declined anytime between April 1, 2020 and the date of written rejection (June 18, 2020). Assuming the Respondent gave notice to the resident district at that time, that, too, would not comply with Neb. Rev. Stat. § 79-237 (R.R.S. 2014).

The State Board rejects the Hearing Officer's recommended Conclusion of Law in paragraph 18 that "the determination of the Respondent school district in denying this application for option enrollment should be affirmed, not due to its noncompliance with deadlines for Petitioners, but due to the effect on failure to notify the resident school district." By state statute, this Board on appeal is to review application denials made by districts, (Neb. Rev. Stat. § 79-239 (R.R.S. 2014). In the event a rejection did not comply with the requirements of the option enrollment statutes, the State Board may order the application approved and the child enrolled. Thus, whenever any appeal is before this Board and it finds that the option district did not so comply in denying an option application, such an order would similarly have such an "effect" on the resident district. This is because the resident district, in cases unlike this case where the option district had complied with the law and notified the resident district in writing that the applicant student's application was denied by April 1, would thereafter assume and plan on the student being enrolled the following school year. A subsequent reversal by this Board later would in essence have the same "effect" on the resident district as that cited in paragraph 18 as the basis to affirm the option district's decision in this case.

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

1. The Hearing Officer's Proposed Findings of Fact 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 were fully set forth verbatim herein.

2. The Hearing Officer's Proposed Conclusions of Law in paragraphs 10-17 are hereby adopted in all respects and made part of this Order by this reference to the same extent and like effect as though such Conclusions were fully set forth herein.

3. The Hearing Officer's Proposed Conclusion of Law in paragraph 18 is rejected. Instead, the Board concludes as is described in the preceding paragraphs of pages 1-3 of this Order.

4. Respondent Wilber-Clatonia Public School's decision to deny the Petitioner's option enrollment application is reversed and the Petitioner's appeal to this Board is granted.

5. The State Board orders Respondent Wilber-Clatonia Schools to approve the Petitioner's option enrollment application for the 2020-2021 school year.

Dated this 7th day of AUGUST, 2020.

NEBRASKA STATE BOARD OF EDUCATION

Maureen Nickels, President

State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 20-13 on August 7, 2020 was 7 in favor, 0 against, 1 abstaining, and 0 absent.

Individual State Board members voted as follows:

IN FAVOR: P. KOCH JOHNS, L. FRICKE, R. WISE, J. WITZEL, P. TIMM, M. NICKELS, D. NEARY

ABSTAINING: R. STEVENS

ABSENT: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon

John Recknor, Esq., 2525 N Street, Lincoln, NE 68510; Gregory Perry, Esq., Perry, Guthery, Haase & Gessford, 233 South 13th Street, Suite 1400, Lincoln, NE 68508 via United States mail, certified mail, return receipt requested, hand delivered to Scott Summers, General Counsel, Nebraska Department of Education, 301 Centennial Mall South, 6th floor, Lincoln, NE and electronically to jfr@recknor.com and gperry@perrylawfirm.com on this 7th day of AUGUST, 2020.

Brenda L. Wiel

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

	)	CASE NO. 20-13
	)	
	)	
	)	RECOMMENDED FINDINGS OF FACT,
Petitioner	)	CONCLUSIONS OF LAW AND DECISION
vs.	)	
	)	
WILBER-CLATONIA PUBLIC SCHOOLS	)	
Raymond Collins, Superintendent	)	
P.O. Box 487, 900 South Franklin Street	)	
Wilber, NE 68465	)	
	)	
Respondent.	)	

INTRODUCTION

Petitioners have filed this appeal, pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2014), and Title 92, NAC, Chapter 61. Petitioners requested that the State Board of Education reverse the Respondent School District's decision denying the application filed by Petitioners to enroll their son in the Wilber-Clatonia Public Schools for the 2020-21 school year.

The hearing on this matter was convened pursuant to notice at about 9:00 a.m. on July 21, 2020 before Jim R. Titus, Hearing Officer, appointed by the State Board of Education. Petitioners were present and appeared through their counsel John Recknor. Respondent appeared through its counsel Gregory Perry. The hearing was recorded by Precision Reporting, Inc. and the transcript of the hearing accompanies this recommendation.

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. (Petitioner) and Raymond Collins (superintendent of Respondent) testified. Ten exhibits were offered and received, namely:

Exhibit 1: Pleadings in the case, including application and denial

Exhibit 2: Answer of Respondent, but not to establish facts

Exhibit 3: Respondent's Board Policy 5006

Exhibit 4: Appendix "I" setting capacities adopted February 17, 2020

Exhibit 5: Minutes of February 17, 2020 Board Meeting

Exhibit 6: Option Application

Exhibit 7: E-mails between Ray Collins and

Exhibit 8: Ray Collins NDE Certificate

Exhibit 9: Title 92 Nebraska Administrative Code Chapter 61

Exhibit 10: Title 92 Nebraska Administrative Code Chapter 19

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 ("student").

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

3. On or about February 10, 2020, Petitioners submitted an Application for Student Transfer Nebraska Enrollment Option Program to Respondent.

4. The application was denied on June 18, 2020 by letter to the Petitioner.

5. Petitioner appealed the denial of the application by letter filed June 30, 2020, for the stated reasons: (1) that the student has a speech issue, especially in stressful situations, and they have found gains confidence in sports to help deal with it; (2) that a coach at resident school is allegedly verbally abusive to athletes, but has been retained; (3) that they believe the

speech program and sports atmosphere is better at Wilber-Clatonia Public Schools.

6. Respondent submitted evidence that their 9th grade class was at or over capacity.

7. and Mr. Collins in their testimony agreed that they had talked in February after the application was filed and that knew that if Mr. Collins acted on the application then it would have been denied due to overcapacity, but since capacity was close to the limit just established by the school board, they would wait to see if numbers changed downward by families moving out or similar reasons. Mr. Collins knew of a family that he understood was likely to move due to a job change. and Mr. Collins then talked and emailed frequently after that to see if the anticipated enrollment numbers had changed. Mr. Collins testified that by June 18, 2020 another family had moved into the district and none had moved out, so were over capacity at 51 and not likely to go under the limit of 50, therefore he sent the denial of the application.

8. There is no evidence of notice to the resident school district as required by Neb. Rev. Stat. § 79-237 (Cum. Supp. 2018). Also, Respondent failed to notify the Petitioners or the resident school district of a decision by April 1, 2020 as required by such statute.

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

RECOMMENDED CONCLUSIONS OF LAW

10. The Respondent argues that if its failure to notify parents of a decision by April 1, 2020 constitutes approval, then this appeal is untimely and should be dismissed. Petitioners perfected their appeal to the State Board of Education in a timely fashion and pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2014) since it was received by the State Board of Education within 30 days of notification of rejection of their application. The State Board of Education has

jurisdiction over this matter and the parties thereto.

11. 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.

12. 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.

13. Respondent's policies provide for the rejection of an application for lack of capacity in a program. The determination of overcapacity was not challenged.

14. The Petitioner did not show the standards adopted by the Respondent were contrary to law.

15. 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.

16. 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 opinion of the speech therapy and treatment in sports programs being better for at Wilber-Clatonia Public Schools.

17. The only basis for a determination that the procedures of Neb. Rev. Stat. §§ 79-234 to 79-241 were not followed by the Respondent school district in their denial of Petitioners' application is that the Respondent did not give written notice of a denial of the application by April 1, 2020 as required by Neb. Rev. Stat. §79-237(1) (Cum. Supp. 2018) which provides as follows:

> "(1) For a student to begin attendance as an option student in an option school district, the student's parent or legal guardian shall submit an application to the school board of the option school district between September 1 and March 15 for attendance during the following and subsequent school years. Except as provided in subsection (2) of this section, applications submitted after March 15 shall contain a release approval from the resident school district on the application form prescribed and furnished by the State Department of Education pursuant to subsection (8) of this section. A district may not accept or approve any applications submitted after such date without such a release approval. The option school district shall provide the resident school district with the name of the applicant on or before

> April 1 or, in the case of an application submitted after March 15, within sixty days after submission. The option school district shall notify, in writing, the parent or legal guardian of the student and the resident school district whether the application is accepted or rejected on or before April 1 or, in the case of an application submitted after March 15, within sixty days after submission. An option school district that is a member of a learning community may not approve an application pursuant to this section for a student who resides in such learning community to attend prior to school year 2017-18.

18. Even though the statute does not state a consequence, the Petitioner argues that Respondent's failure to timely notify them should be deemed to allow the application in the event of such failure by a school district. However, it is apparent from the testimony that the Petitioners knew the decision would be a denial and appreciated that the superintendent would hold out making a decision on their application to see if the enrollment would drop below 50 for the ninth grade since it was so close and Mr. Collins had heard of a family that might move. The Petitioners and the superintendent were in regular communication by email and phone, so the were not unaware that unless the numbers dropped below 50 students for the ninth grade that their application would be denied. Yet the resident school district would not know if this student had left their school district by April 1, or had any right to release or reject release of an application deadline, so it would not know if their enrollment had dropped, affecting funding, decisions on option enrollment and applications to it. Therefore, the determination of the Respondent school district in denying this application for option enrollment should be affirmed, not due to its noncompliance with deadlines for Petitioners, but due to the effect on failure to notify the resident school district, and the lack of injury to the Petitioners who were aware of the likely denial and reason for the delay.

RECOMMENDED DECISION

The following is recommended by the Hearing Officer:

(a) That the Respondent School District's decision to deny Petitioner's option

enrollment application be affirmed.

(b) The State Board of Education as a part of its order shall adopt the Hearing Officer's findings of fact and conclusions of law in all respects, and that such be made part of its order by reference to the same extent and like effect as if such findings of fact and conclusions of law were fully set forth verbatim in its order.

DATED: July 24, 2020.

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

I certify that on July 24, 2020, I served a true and correct copy of the foregoing order by email on the following parties:

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