

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

	)	
	)	CASE NO. 21-05
	)	
	)	
Petitioner,	)	
vs.	)	
	)	<b>FINAL ORDER</b>
	)	
PAPILLION LAVISTA	)	
COMMUNITY SCHOOLS	)	
Andrew Rikli, Superintendent	)	
420 S. Washington Street	)	
Papillon NE 68046,	)	
	)	
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 Papillion La Vista Community Schools for the 2021-22 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.

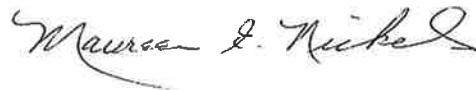
WHEREFORE, the Nebraska State Board of Education orders as follows:

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 Papillion LaVista Community School's decision to deny the Petitioner's option enrollment application is affirmed and the Petitioner's appeal to this Board is denied.

Dated this 4<sup>th</sup> day of JUNE, 2021.

NEBRASKA STATE BOARD OF EDUCATION



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Maureen Nickels, President  
State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 21-05 on June 4, 2021 was 6 in favor, \_\_\_ against, \_\_\_ abstaining, and 2 absent.

Individual State Board members voted as follows:


IN FAVOR: M. NICKELS, P. KOCH JOHNS, P. GUBBELS, J. MORRISON, R. STEVENS,  
L. FRICKE

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

ABSENT: P. TIMM, D. NEARY

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon Amy Bonn, Esq., Attorney for Petitioner, 2805 Leigh Lane, Papillion, NE 68133; Karen A. Haase, Esq., Attorney for Respondent, KSB School Law, PC, LLO, 301 S. 13<sup>th</sup> Street, Suite 210, Lincoln, NE 68508 via United States mail, certified mail, return receipt requested, hand delivered to Scott Summers, General Counsel, Nebraska Department of Education, 500 S. 84<sup>th</sup> Street, 2<sup>nd</sup> floor, Lincoln, NE and electronically to [amy@amybonnlaw.com](mailto:amy@amybonnlaw.com) and [karen@ksbschoollaw.com](mailto:karen@ksbschoollaw.com) on this 7<sup>th</sup> day of JUNE, 2021.

  
\_\_\_\_\_

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

CASE NO. 21-05

  )                       CASE NO. 21-05  
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  )  
  )                       RECOMMENDED FINDINGS OF FACT,  
  )                       CONCLUSIONS OF LAW AND DECISION  
vs.    )  
  )  
PAPILLION LAVISTA                                   )  
COMMUNITY SCHOOLS                               )  
Andrew Rikli, Superintendent                   )  
420 S. Washington Street                       )  
Papillion, NE 68046,                             )  
  )  
  )                       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 Petitioner to enroll their    in the Papillion LaVista Community Schools for the 2021-22 school year.

The hearing on this matter was convened pursuant to notice via a video computer conference, where the hearing officer and all the parties and witnesses could see and hear each other, at about 9:00 a.m. on Thursday May 13, 2021 before Jim R. Titus, Hearing Officer, appointed by the State Board of Education. Petitioners were present and were represented by their counsel Amy K. Bonn. Respondent appeared through its counsel Karen A. Haase. 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.    (Petitioners) and Dr. Becky Meyers and Dr. Tammy Voisin (employees of Respondent) testified. Twenty-two exhibits were offered and received by stipulation of the parties, namely:  
Exhibit 1. Correspondence to Papillion La Vista Community Schools from NDE re: appeal, Assignment of Case to Hearing Officer and Certificate of Service of copy of Petition, dated April

7, 2021;

Exhibit 2. Petition of Appeal

Exhibit 3. Application for Student Transfer: Nebraska Enrollment Option Program for  
submitted by Petitioner dated February 9, 2021

Exhibit 4. Email from Mandy Condrey, Administrative Assistant of Student Services for  
Respondent school district to Petitioner dated March 19, 2021

Exhibit 5. Memo to parents/guardians of re: denial of enrollment option  
application, dated April 9, 2021

Exhibit 6. Respondent's school board Policy 5004 as it was published online by Respondent as  
of March 23, 2021

Exhibit 7. Respondent's school board Procedure 5101 A-D as it was published online by  
Respondent as of March 23, 2021

Exhibit 8. Email from Kati Settles to Andrew Rikli, Trent Steel, and Becky Meyers re: For Board  
Report, Dated December 3, 2020

Exhibit 9. Transfers and Capacity for 2019-2020; 9/27/18

Exhibit 10. Transfers and Capacity for 2020-2021; 11/19

Exhibit 11. Transfers and Capacity for 2021-2022; 12/20

Exhibit 12. Internal Transfers, Dated February 20, 2019

Exhibit 13. External Transfers, Dated February 20, 2019

Exhibit 14. OE Projected Enrollments; 2021-2022

Exhibit 15. Memo re: Special Education 2021-2022 Staffing

Exhibit 16. Option Enrollment Spreadsheet, 2021-2022

Exhibit 17. Projection Staffing Worksheet, January 1, 2021

Exhibit 18. Staffing Worksheet, February 1, 2021

Exhibit 19. Staffing Worksheet, March 1, 2021

Exhibit 20. 2020-2021 Enrollment Capacity Data Sheets submitted by Respondent PLCS to the  
Learning Community Coordinating Council

Exhibit 21. Option Enrollment Data Sheet, 2021-2022 [repeat of Exhibit 16]

Exhibit 22. Email from Mandy Condrey to accepting the enrollment option  
application of Petitioners' dated March 19, 2021

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

Upon stipulation of the parties, findings 1 through 19 are adopted. Additional findings of fact below are also adopted.

1. Petitioners \_\_\_\_\_ are the parents of \_\_\_\_\_
2. Petitioners are residents of Bellevue, Nebraska, and their school district of residence is Bellevue Public Schools.
3. \_\_\_\_\_ is a student with a disability under the Individuals with Disabilities Education Act. \_\_\_\_\_ received special education services pursuant to an individualized education program (IEP) from Bellevue Public Schools during the 2020-21 school year.
4. In its Memorandum of Understanding on page 2 of the enrollment option application provided by Respondent and completed by Petitioners, Respondent school district included the announcement that “high schools and middle school are not available, and the following elementary schools are not available: Prairie Queen, Bell Elementary, and Patriot Elementary.”
5. On February 9, 2021, Petitioner \_\_\_\_\_ timely filed an application via email for the option enrollment of \_\_\_\_\_, with the Papillion La Vista Community Schools pursuant to the district’s enrollment option program.
6. In this application, Petitioner \_\_\_\_\_ requested enrollment for \_\_\_\_\_ in Kindergarten in one of these three schools, in order of preference: Hickory Hill Elementary School, Walnut Creek Elementary School, and Anderson Grove Elementary School.
7. \_\_\_\_\_ parents identified \_\_\_\_\_ as a student with an IEP on \_\_\_\_\_ option enrollment application.
8. On March 19, 2021, Mandy Condrey, Administrative Assistant of Student Services for Respondent school district, sent Petitioner \_\_\_\_\_ an email stating that the application for \_\_\_\_\_ to attend Papillion La Vista Community Schools via the Enrollment Option Program had been denied.
9. On March 22, 2021, Ms. Condrey and Petitioner \_\_\_\_\_ spoke on the phone about the school district’s rejection of the enrollment option application for \_\_\_\_\_.
10. With the exception of the enrollment option application for \_\_\_\_\_ at no point did the Petitioners send \_\_\_\_\_ IEP or any documents pertaining to education or \_\_\_\_\_ educational needs to Respondent school district or its representatives or

employees.

11. At no point prior to Respondent's denial of application for enrollment via the enrollment option program did any representatives or employees for the Respondent school district request or receive from Petitioners any information about Student's educational or disability-related needs or past or current education or disability related programs or placements.

12. Prior to March 20, 2021, Respondent school district's Board did not include in its current Board policies or procedures any information specifically related to the maximum enrollment option capacities of Petitioners' three preferred schools (Hickory Hill Elementary School, Walnut Creek Elementary School, and Anderson Grove Elementary School).

13. Prior to March 20, 2021, Respondent school district's Board did not adopt a resolution specifically related to the maximum enrollment option capacities of Petitioners' three preferred schools (Hickory Hill Elementary School, Walnut Creek Elementary School, and Anderson Grove Elementary School).

14. Prior to March 20, 2021, Respondent school district's Board did not include in its current Board policies or procedures any information specifically related to the maximum enrollment option capacities of Kindergarten classrooms in the school district.

15. Prior to March 20, 2021, Respondent school district's Board did not adopt a resolution specifically related to the maximum enrollment option capacities of Kindergarten classrooms in the district.

16. Prior to March 20, 2021, Respondent school district's Board did not include in its current Board policies or procedures any information specifically related to the maximum enrollment option capacities of special education programs in the school district.

17. Prior to March 20, 2021, Respondent school district's Board did not adopt a resolution specifically related to the maximum enrollment option capacities of special education programs in the school district.

18. Prior to March 20, 2021, Respondent school district's Board did not include in its current Board policies or procedures any information specifically related to the maximum enrollment option capacities of special education classrooms in the school district.

19. Prior to March 20, 2021, Respondent school district's Board did not adopt a resolution specifically related to the maximum enrollment option capacities of special education classrooms in the school district.

20. In exhibits 6 and 7 the respondent has adopted policies for the superintendent to develop administrative procedures to be followed for all enrollment option applications, with class size, staffing, grade-level capacity, building capacity and enrollment management strategies established by the school administration and/or Board of Education, all to be considered when approving or denying applications.

21. The Respondent uses a weighted average approach in determining capacity. In order to determine special education weighted caseloads, the District's special education staff assesses the needs of students who are already receiving special education services at the district and assigns a value to each student based on the significance of his or her needs. To determine the weight assigned to each special education student, multiple staff members assign a value of 1 through 4 to each student in each of the following four categories: communication, behavior, self-help and instructional need. Students are then assigned an overall weight based on the data from the staff weighting in these categories. For example, a student who receives assistance for a specific learning disability with 15 minutes of pull-out services and who has no communication, behavior or self-help deficits would likely receive a weighted value of 1; while a student with low cognitive function who also requires a 1:1 paraeducator to assist him or her on a full-time basis due to communication and behavioral deficits would likely receive a weighted value of 4. Once the weighted caseload is determined for each building, district staff compile a spreadsheet recording the total weights of students and numbers indicated in the building specific row. Then the spreadsheet calculates how many teachers the district needs to maintain a 25 average in the "Teachers" column. (Exhibit 15, 17, 18, 19). The calculations are made on a monthly basis with final analysis after the option enrollment application deadline of March 15 to determine acceptance or denial of applications.

22. Respondent has set a maximum capacity for its elementary special education program at a weighted caseload of 25 students per teacher. (Exhibit 17, 18, 19). Exhibit 19 shows that in March it was determined that all of the district's elementary buildings were at or over capacity for their special education programs. Petitioners requested that

be assigned to one of three elementary buildings, each of which is over the capacity of 25 weighted caseload per teacher. Hickory Hill's weighted caseload average is 27.50, Anderson's weighted caseload average is 26.29 and Walnut's weighted caseload average is 26.57. (Exhibit 19). option application was denied based on this lack of capacity.

23. Even a student with an IEP with a weighted value of 1 has legal obligations that



exist beyond instructional time, namely progress reports quarterly to the parents, evaluations, written notice of all decisions to the student's parents, and team meetings.

24. Completed Enrollment Capacity data sheets have not been submitted to the Learning Community office as of the date of hearing as they are not due yet. Last year's due date was August 1.

#### RECOMMENDED CONCLUSIONS OF LAW

25. Petitioners perfected their appeal to the State Board of Education in a timely fashion and pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2014). The State Board of Education has jurisdiction over this matter and the parties thereto.

26. 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.

27. Neb. Rev. Stat. § 79-238 (1) (Cum. Supp. 2020) 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.

28. Petitioner's primary arguments are that the Respondent board has not adopted specific standards for the acceptance or rejection of an option enrollment application and that failure to obtain and review an applicant's IEP fails to consider specific standards for capacity as to the availability of an appropriate special education program. Petitioners' arguments include citation to a seventh circuit court of appeals case where the court found it necessary for the district to review an IEP in its consideration, yet that was in the context of a Wisconsin law specifically requiring such review. Nebraska does not have such a statutory requirement.

29. 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.

30. 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).

31. Under policies adopted by the school board (Exhibits 6 and 7), the superintendent was authorized to develop administrative procedures to be followed for all enrollment options applications, and class size, staffing, grade-level capacity, building capacity and enrollment management strategies established by the school administration and/or board all are to be considered when approving or denying applications.

32. The State Board of Education has rejected the petitioner's rigid requirement for the school board to set specific criteria and numbers for capacity in case #16-01:

The Petitioners interpret the option enrollment statutes as requiring a school district to give specific maximum student numbers for every program, class, grade level, or school building, without any flexibility for the specific needs of option students who may

increase the operating costs or staff needs of the school district. This is too narrow of an interpretation of the statute, as shown by previous decisions of the State Board of Education and by the language of the statute, which also allows the school board to simply by resolution declare a program unavailable to option students due to lack of capacity, which authority was in this instance delegated to the superintendent.

33. While reviewing an IEP as required by Wisconsin law may be one way to achieve compliance with anti-discrimination laws, it is not the only way and may open a school district to a charge of choosing the students with the lesser needs and therefore discriminating on the basis of the kind of disability. Nebraska's Department of Education has chosen not to request a copy of the IEP on its options enrollment application. The respondent uses the weighted approach described in the findings of fact to determine if capacity in a grade is exceeded, thereby disallowing a student with a weighted value of 1 where capacity is exceeded yet allowing a student with a weighted value of 4 (higher needs) to be accepted where the weighted average is below the capacity limit, even if it would then cause the weighted average to exceed the capacity limit, since the school district would not know an applicant's needs or weighted value.

34. 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 this application for option enrollment should be affirmed.

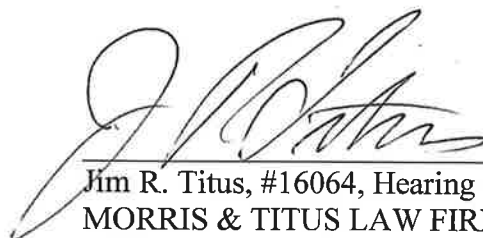
#### RECOMMENDED DECISION

The following is recommended by the Hearing Officer:

(a) That the Respondent School District's decision to deny 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 May 21, 2021.



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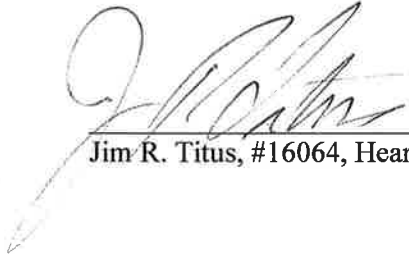
CERTIFICATE OF SERVICE

I certify that on May 21, 2021, I served a true and correct copy of the foregoing document by email on the following parties, together with the transcript and pleadings to Mr. Summers by hand delivery:

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