

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

CASE NO. 22-14

Petitioner,

vs.

FINAL ORDER

PONCA PUBLIC SCHOOLS
Brendon Calahan, Superintendent
505 3rd Street
P.O. Box 568
Ponca NE 68770,

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 Ponca Public School District for the 2022-23 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 Ponca Public 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 30th day of AUGUST, 2022.

NEBRASKA STATE BOARD OF EDUCATION



Patsy Koch Johns, President
State Board of Education

The vote by the State Board of Education to approve the Final Order in Case No. 22-14 on August 30, 2022 was 5 in favor, ___ against, ___ abstaining, and 3 absent.

Individual State Board members voted as follows:

IN FAVOR: P. KOCH JOHNS, M. NICKELS, R. STEVENS, L. FRICKE, K. PENNER

AGAINST: _____

ABSTAINING: _____

ABSENT: J. MORRISON, P. GUBBELS, D. NEARY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon Karen A. Haase, Esq., Attorney for Respondent, KSB School Law, PC, LLO, 301 S. 13th Street, Suite 210, Lincoln, NE 68508 and Lee Kubik, P. O. Box 134, Jackson, NE 68743 via United States mail, certified mail, return receipt requested, hand delivered to Juan Román, General Counsel, Nebraska Department of Education, 500 S. 84th Street, Lincoln, NE on this 31st day of AUGUST, 2022.

A handwritten signature in blue ink, appearing to read "Brenda Wid", is written over a solid horizontal line.

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

CASE NO. 22-14

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Petitioner,)	
)	
vs.)	HEARING OFFICER'S PROPOSED
)	FINDINGS OF FACT, CONCLUSIONS OF
PONCA PUBLIC SCHOOLS)	LAW AND RECOMMENDED DECISION
Brendan Calahan, Superintendent)	
505 3 rd Street)	
P.O. Box 568)	
Ponca, NE 68770)	
)	
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 Nebraska State Board of Education reverse the respondent school district's decision disapproving the application filed by petitioner to enroll in the Ponca Public School District for the 2022-23 school year.

A hearing on this matter was convened pursuant to notice by Zoom video conferencing on June 10, 2022 at 9:00 a.m. before the hearing officer, Jim R. Titus, appointed by the Nebraska State Board of Education. Petitioner appeared pro se. Respondent appeared through its counsel Karen Haase. The hearing was recorded by Precision Reporting, Inc. and a 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 Nebraska Department of Education, Title 92 NAC Chapter 61. and
Brendan Calahan, superintendent of respondent, testified. 32 exhibits were offered and received without objection, namely:

<u>Ex. #</u>	<u>Date</u>	<u>Description</u>
1.	06/01/22	22-23 Capacity Projection from Ponca Public Schools
2.	06/01/22	Option Students – Yellow are the students on IEP from Ponca Public Schools
3.	06/01/22	Discovery Request Response from Karen Haase
4.	01/20/20	Policy 5006 from Ponca Public Schools
5.	12/16/19	Policy 5006 from Ponca Public Schools
6.	07/18/16	Policy 5006 from Ponca Public Schools
7.	03/24/15	14-15 Capacity Appendix 1 to Policy 5006 from Ponca Public Schools
8.	11/12/15	15-16 Capacity Appendix 1 to Policy 5006 from Ponca Public Schools
9.	03/20/17	16-17 Capacity Appendix 1 to Policy 5006 from Ponca Public Schools
10.	02/09/18	Notice of Initial Evaluation and Child Assessment
11.	03/21/22	Ponca Public Schools Board Meeting Minutes
12.	01/17/22	Ponca Public Schools Board Meeting Minutes
13.	02/21/22	Ponca Public Schools Board Meeting Minutes
14.	Various	2021 Ponca Public Schools Board Meeting Minutes
15.	Various	2020 Ponca Public Schools Board Meeting Minutes
16.	Various	2019 Ponca Public Schools Board Meeting Minutes
17.	Various	2018 Ponca Public Schools Board Meeting Minutes

18. 05/24/22 Answer by Respondent
19. 06/06/22 Number of students from Jackson, NE in the Homer School District that attend Homer Community Schools. From Abbie Uhl, Homer Elementary Principal.
20. 06/06/22 Map from Petitioner's home to Jackson Elementary School with time and distance.
21. 06/06/22 Map from Petitioner's home to Homer Elementary School by paved roads with time and distance.
22. 03/01/22 T-ball practice video.
23. 06/01/22 Jackson, NE T-ball team after game video.
24. (none given) Correspondence to Ponca Public Schools from NDE re appeal; Assignment of Case to Hearing Officer; Certificate of Service – Petition
25. 05/10/22 Petition from
26. 03/07/22 Application for Student Transfer – Nebraska Enrollment Option Program
27. 03/21/22 Denial of option application (with mall receipt)
28. 01/20/20 Policy 5006 - Option Enrollment
29. 01/20/20 Option Enrollment Capacity Resolution
30. 03/04/22 Individual Education Program for (in effect 3/5/22 – 3/3/23)
31. 02/21/22 22-23 Services Contract between Ponca Public Schools and ESU 1
32. 08/16/21 Correspondence from Superintendent Brendan Calahan to re Denial of Preschool Enrollment for 21-22 School Year

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 _____ (“the student”) and reside in the Homer Community school district. Homer Community school district operates Homer Elementary (“Homer”) in Homer, Nebraska.

2. Ponca Public Schools (“Ponca”) is a school district as defined by Neb. Rev. Stat. § 79-101(1). Ponca operates Jackson Elementary School (“Jackson”) in Jackson, Nebraska.

3. The _____ application for student transfer to Ponca/Jackson (“application”) was timely filed. It shows that the student will require special education services and does have an individualized education program (“IEP”) E26.

4. The application was denied for the stated reason that the applicable program was at capacity and the current staff and facilities are not sufficient to accommodate the needs of the student without significantly increasing the operating costs of the school district (“denial letter”). E27, E4 - E9. Respondent’s school board policy lists these as two of the reasons for rejection of an option enrollment application. E28, E29.

5. The IEP in effect for the relevant school year states the student needs assistance with toileting, speech-language therapy and special instruction of 60 minutes per day for 30 days per semester, physical therapy and occupational therapy for 60 minutes per day for 15 days per semester, a nurse with _____ whenever _____ is at school, nearby staff to help prevent injury from falls and other needs as specified on pages 16 to 20 of the IEP. E30

6. Exhibit 1 shows level II and III special education at Ponca to be zero capacity for option students. The superintendent for Ponca testified that they do not have a full-time nurse, are short a paraprofessional and would need to contract at additional cost for a speech pathologist, occupational therapist and physical therapist, for which services they currently have a contract at a rate for the latter two services of \$130 per hour. The facility also lacks additional private space for some of the services required. E1

7. The _____ live in Jackson, Nebraska and are about two minutes from Jackson. They believe all the other school age children in Jackson, Nebraska attend such school, rather than Homer school which is a drive of about twenty minutes.

RECOMMENDED CONCLUSIONS OF LAW

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 Nebraska State Board of Education has jurisdiction over this matter and the parties thereto.

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.

Neb. Rev. Stat. § 79-238 (1) (Reissue 2014) provides in part 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....”

At the time of Petitioner’s option enrollment application, they lived and still live in the Homer Community school district.

The denial letter states the reasons why the school rejected the application, which reasons are in accordance with Ponca’s policies. The testimony and exhibits support that additional staff

and contract services would be needed to provide the student with IEP services.

The Nebraska 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 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.

The Nebraska 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).

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 the denial of the application, nor that this denial was arbitrary or unreasonable. Therefore, the determination of the respondent school district in rejecting this application for option enrollment should be affirmed.

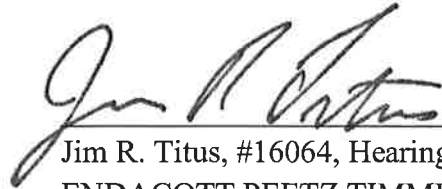
RECOMMENDED DECISION

The following is recommended by the hearing officer:

(a) That the respondent school district's decision to deny the petitioner's option enrollment application be affirmed.

(b) The Nebraska 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: June 24, 2022.



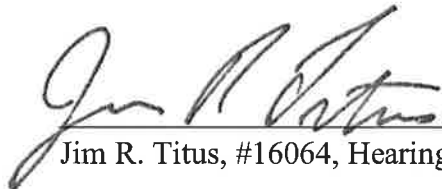
Jim R. Titus, #16064, Hearing Officer
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CERTIFICATE OF SERVICE

I certify that on June 24, 2022, I served a true and correct copy of the foregoing document by email on the following parties:

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Jim R. Titus, #16064, Hearing Officer