

JUL 21 2025

NEBRASKA DEPARTMENT OF EDUCATION

BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION

[Redacted]

Case No. 24-02 SE

FINAL ORDER AND DECISION

PETITIONERS,

vs.

ELKHORN PUBLIC SCHOOLS
20650 Glenn Street
Elkhorn, NE 68022,

RESPONDENT

This matter came on for final hearing in LaVista, Nebraska on July 14, 2025. Appearing as legal counsel for the Petitioners was their attorney, Erick A. Martin. There was no appearance by Petitioners [Redacted] Appearing on behalf of Respondent were attorneys Haleigh Carlson and Greg Perry. After both parties rested following the evidentiary hearing, final oral argument was given by counsel for Respondent. Petitioners counsel waived final argument. Following an opportunity for any further written briefing in this case, concluding on July 18, 2025, this matter was submitted to me for decision.

CASE BACKGROUND

Petitioners [Redacted] on behalf of their [Redacted] filed a Due Process Petition with the Nebraska Department of Education on May 28, 2024. The date for the evidentiary hearing was agreed upon during a telephonic status conference on May 12, 2025. Present at that conference was the undersigned hearing

officer, the Petitioners, [REDACTED] and counsel for the Respondent, Elkhorn Public Schools, Haleigh Carlson. During that telephonic hearing, the Petitioners specifically requested that the final hearing begin on July 14, 2025, at ESU #3 in LaVista, Nebraska and reserved the entire week for hearing this case. A scheduling order sent to the parties the same day outlined that the hearing would begin at 9:00 a.m. each day, until concluded. During a telephonic status conference on May 23, 2025, the Petitioners expressed their desire that the final hearing not be continued to a later date. On June 2, 2025, Erick Martin entered his appearance as counsel for the Petitioners, and represented Petitioners on all matters thereafter.

This case was convened for a formal evidentiary hearing at ESU #3 in LaVista, Nebraska at 9:00 a.m. on July 14, 2025. Appearing on behalf of the Petitioners [REDACTED] [REDACTED] was their attorney, Erick Martin. There was no appearance by either Petitioner at this hearing. Appearing on behalf of Respondent Elkhorn Public Schools (EPS) were attorneys Haleigh Carlson and Greg Perry. Kristi Gross, Director of Special Education at Elkhorn Public Schools, was present at the hearing as the party representative for Respondent. There were seven additional witnesses for Respondent present in the hearing room.

Preliminary matters discussed included an explanation by Mr. Martin, as counsel for the Petitioners, who described his efforts to contact his clients and coordinate with Petitioners, and further stated that he was not successful in communicating with his clients to assure their presence at the hearing. Given the prior rulings in the case,

including the scheduling of the hearing dates directly with Petitioners, this matter went forward to formal hearing with no objection from either party.

Opening statements were waived by the parties. With respect to the Petitioners' case, Petitioner's attorney asked for and received judicial notice of the pleadings on file, including the Complaint and Answer to the Complaint filed by Respondent, together with other filings in the case including all Progression Orders. Petitioners rested without further evidence.

After Petitioners' rest, Respondent initially moved to dismiss the case, with prejudice. Counsel for petitioner did not offer any argument in opposition to the motion. After a discussion, counsel requested a recess. Following the recess, and readjournment at 10:30 a.m., Respondent withdrew its motion to dismiss and proceeded to present Respondent's case at this hearing. In that regard, Respondent rested its case without introduction of any additional evidence. Petitioner waived rebuttal. The case moved to final argument.

Final oral argument was presented by counsel for Respondent. Counsel for Petitioners waived oral argument. After a final opportunity for briefing, the case was submitted for decision on July 18, 2025.

JURISDICTION

Jurisdiction is based on Chapter 55 of Title 92 of the Nebraska Administrative Code, the Nebraska Special Education Act, Neb. Rev. Stat. § 79-1110 et seq., and the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq.

ISSUES PRESENTED

Pursuant to a stipulation filed by the parties, the issues to be determined, based on a preponderance of the evidence, are:

1. Whether the District offered ██████████ a FAPE during the Spring and Summer of 2024.
2. Whether the District made available a FAPE to ██████████ during the 2024-25 school year

LEGAL AUTHORITY AND ANALYSIS

The issue in this case is whether a free appropriate public education (“FAPE”) has been provided to ██████████ during the time ██████ was enrolled at Elkhorn Public Schools. The United States Supreme Court in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017), defines the following FAPE standard: “██████ educational program must be appropriately ambitious in light of ██████ circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have a chance of meeting challenging objectives.” *Id.* Based on this, ██████████ should be provided with “an educational program reasonably calculated to enable ██████ to make progress appropriate in light of ██████ circumstances.” *Id.* at 1001.

Petitioners bear the burden of proof in this proceeding. “The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). *See also Lathrop R-II School District v. Gray*, 611 F.3d 419 (8th Cir. 2010) (“the burden of persuasion remains with Gray as

the party challenging the IEP,” *citing Sch. Bd. v. Renollett*, 440 F.3d 1007, 1010-11 (8th Cir. 2006).

In this case, Petitioners failed to appear at the due process hearing, did not present any testimony, and did not offer or move to admit any documentary evidence into the record. While counsel for Petitioners asked me to take judicial notice of the pleadings, it is well-established that pleadings are not evidence. The Nebraska Supreme Court has held that “pleadings alone are not proof but mere allegations of what the parties expect the evidence to show.” *Provident Trust Co. v. Radford (In re Estate of Radford)*, 297 Neb. 748, 759 (2017). *See also Wilson v. Wilson*, 238 Neb. 219 (1991) (“Pleadings alone are not proof but mere allegations of what the parties expect the evidence to show. Appellee’s petition and appellant’s response to it set out only a factual and legal dispute”); and *Turner v. Cincinnati Ins. Co.*, 9 F.4th 300, 315 (5th Cir. 2021) (“A complaint is not evidence of the facts that are alleged.”).

Further, although there were “exhibits” attached to both the Petition and the Answer, no weight can be given to the information contained within those attached records. The Nebraska Supreme Court has made it clear, “we have held that pleadings **and their attachments** which were not properly admitted into evidence could not be considered by the trial court.” *Provident Trust Co., supra* (emphasis added); *see also Cami S. v. Neb. HHS (In re Issaabela R.)*, 27 Neb. App. 353, 357-58, 932 N.W.2d 749, 754 (2019) (“Pleadings **and their attachments** which are not properly admitted into evidence cannot be considered by the trial court . . . evidence which is not made a part of the bill of exceptions may not be considered. As a result, we cannot consider

allegations contained in a pleading as substantive evidence.”) (emphasis added)). In *Provident Trust Co. v. Radford*, the Supreme Court analyzed an analogous situation to the case here.

[A] hearing was held but no sworn testimony was given and no exhibits were offered or received into evidence. Although the court was asked to take judicial notice of its file, it failed to identify what documents it was noticing and did not mark and introduce into evidence each document that it considered. On appeal, the Supreme Court concluded that as a result, the only information available for review was the pleadings, the attachments to the pleadings, and the court’s order. But because these were not properly admitted into evidence, they could not be considered by the trial court. *In re Issaabela R.*, 27 Neb. App. at 358-59.

These legal principles apply with equal force in the context of a due process hearing brought under the Individuals with Disabilities Education Act (IDEA) and under 92 Nebraska Administrative Code Chapter 55.

In this case, Petitioners did not request that any of the pleadings be admitted into evidence. None of the pleadings—nor any documents attached to them—were marked, offered, or admitted into evidence. As a result, there is no probative evidence before me to consider. While the Petitioners alleged in their complaint that [REDACTED] was denied a FAPE by the Respondent, and while this matter does involve the education of a child with a disability, the law is clear: it is the Petitioners’ responsibility to prove their allegations by a preponderance of

the evidence. Allegations alone do not constitute proof.

The procedural history of this matter further underscores the absence of evidence. The record reflects that Petitioners actively participated in selecting the hearing date and location and affirmatively requested that the hearing proceed as scheduled. Despite this, they failed to appear and appear to have ceased communication with their legal counsel prior to the hearing. As a result, no witnesses were disclosed or presented, and no evidence was introduced on their behalf.

Respondent has no obligation under Nebraska Rule 55 or under the IDEA to rebut allegations for which no supporting evidence is offered. The responsibility to build the evidentiary record lies with the party bearing the burden of proof.

Under these circumstances, I am left with no factual basis on which to find in favor of Petitioners. The IDEA requires more than allegations—it requires proof. Because the Petitioners failed to present any admissible evidence or sworn testimony, they have not met their burden of proof. Accordingly, the claims must be denied. My order follows.

DECISION

The Petitioners failed to meet their burden of proof related to both issues presented to me for consideration. There is insufficient evidence to prove that Respondent failed to provide a free appropriate public education to [REDACTED] in accordance with federal and state law and applicable regulations during the spring and summer of 2024 or during the 2024-25 school year.

The Petitioners' Special Education Petition is dismissed. Petitioners shall pay their own costs, as I have determined that Respondent is not responsible for any attorney fees

or costs incurred by Petitioners. Respondent is the prevailing party. Judgment is entered accordingly.

Date: July 21, 2025.



Robert F. Bartle
Hearing Officer

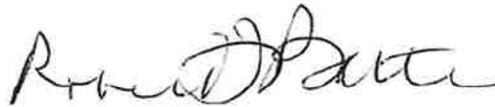
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on counsel of record by sending same by electronic mail on this 21st date of July, 2025, addressed as follows:

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Robert F. Bartle
Hearing Officer