

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

	)	
	)	
	)	CASE NO. 19-05
	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	FINAL ORDER
	)	
WESTSIDE COMMUNITY SCHOOLS	)	
909 South 76 <sup>th</sup> Street	)	
Omaha NE 68114	)	
	)	
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 Westside Community Schools for the 2019-2020 school year.

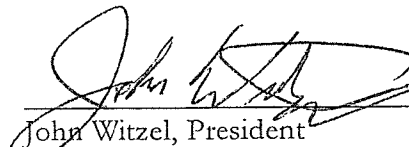
The State Board of Education, having considered the record in the case and the Hearing Officer's Proposed Findings of Fact, Recommended Conclusions of Law and Recommended Decision, and having been fully advised in the matter, finds that it should adopt and incorporate by reference in its Order as its Findings of Fact and Conclusions of Law and Decision, the Hearing Officer's Findings of Fact and Conclusions of Law and Recommended Decision.

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 Westside Community Schools' decision to deny the Petitioners' option enrollment application is affirmed and the Petitioner's appeal to this Board is denied.

Dated this 9<sup>th</sup> day of August, 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. 19-05 on August 9, 2019, was 8 in favor, 0 against, 0 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,  
R STEVENS, D NEARY

AGAINST:

ABSTAINING:

ABSENT:

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served upon  
Karen Haase, Esq., KSB School  
Law, PC, LLO, 301 S. 13<sup>th</sup> Street, Suite 210, Lincoln, NE 68508 and Westside Community Schools, 909  
South 76<sup>th</sup> Street, Omaha NE 68114 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, 6<sup>th</sup> floor, Lincoln, NE, on this 9<sup>th</sup> day of August, 2019.

Brenda L. Wild

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

CASE NO. 19-05

	)	
	)	
	)	
	)	
	)	
	)	HEARING OFFICER'S PROPOSED
	)	FINDINGS OF FACT, CONCLUSIONS OF
Petitioner,	)	LAW AND RECOMMENDED DECISION
	)	
vs.	)	
	)	
WESTSIDE COMMUNITY SCHOOLS,	)	
909 South 76 <sup>th</sup> Street	)	
Omaha, NE 68114	)	
	)	
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 State Board of Education reverse the Respondent School District's decision rescinding approval of the application filed by Petitioner to enroll [redacted] in the Westside Community Schools for the 2019-20 school year.

The hearing on this matter was convened pursuant to notice at the Westside Administrative offices at about 8:52 a.m. on June 25, 2019 before Jim R. Titus, Hearing Officer, appointed by the State Board of Education. Petitioner appeared pro se through his father Russell Reynolds. Respondent appeared through its counsel Karen Haase and Cody Pruett. The hearing was recorded by the hearing officer and a compact disc containing the audio 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. Alan Bone, Director of Student Services, Julie Thacker, Building Administration Assistant, Kami Jessop, Director of Special Services, Jonathan Reynolds and Russell Reynolds testified. Fifteen exhibits were offered and received without objection, namely:

- Exhibit 1: 5/13/19 Letter to Westside Community Schools from NDOE regarding appeal; Assignment of Case to Hearing Officer; Certificate of Service for Petition
- Exhibit 2: 5/7/19 Petition
- Exhibit 3: 2/1/19 Application for Student Transfer – Nebraska Enrollment Option Program
- Exhibit 4: 4/1/19 Letter from Alan Bone to
- Exhibit 5: 4/2019 Option Enrollment Acceptance Form 2019-2020
- Exhibit 6: 4/11/19 Email from Julie Thacker to
- Exhibit 7: 4/12/19 Letter from Alan Bone to
- Exhibit 8: 11/20/14 Special Education Documents (OPS Evaluation Report); 11/20/14 OPS MDT Report S-L I Articulation; 11/20/14 OPS MDT Report; 6/13/16 Boys Town Audiological Record; 10/3/17 OPS PWN; 10/4/17 OPS Notice of Review of Existing Evaluation Data; 10/4/17 OPS MDT Report Hearing Impairment; 8/14/18 Boys Town Audiological Record; 9/24/18 IEP; 3/7/19 Progress Report; (21 pages)
- Exhibit 9: 2/2019 Projected Special Services Weighted Caseloads
- Exhibit 10: 4/2019 Projected Special Services Weighted Caseloads
- Exhibit 11: 2/28/19 18-19 Staffing Equity with Projected Tab
- Exhibit 12: May 2019 18-19 Staffing Equity with Projected Tab
- Exhibit 13: 3/14/19 Anticipated Capacity for Option Enrollment Special Education 19-20
- Exhibit 14: Westside Community Schools Board of Education Policy 5112 – Enrollment for Non-Residents

Exhibit 15: 6<sup>th</sup> Grade Report Card for

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. Westside Community Schools is a school district as defined by Neb. Rev. Stat. § 79-101(1).
3. On or about February 1, 2019, \_\_\_\_\_ father of \_\_\_\_\_ submitted an Application for Student Transfer Nebraska Enrollment Option Program to Respondent. The question on the form that asked whether the student required special education services was marked 'no'.
4. The application was accepted on April 1, 2019 by a letter that included an acceptance form. The acceptance form was filled out, signed by the father, and included a checked box for the statement "My student has an Individual Education Plan (IEP/MDT) and requires special education services." The student's IEP showed the need to be based on a hearing loss and a need for a hearing aid.
5. Upon receiving the acceptance form the Respondent requested Petitioner's IEP, which was provided, and then on April 12, 2019 notified Petitioner that approval to attend Westside Community Schools was rescinded due to the false information on the application and the special education program at the middle school being at capacity. The rescission occurred prior to the Petitioner's attendance as an option student.

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

7. Petitioner and father testified that they did not want special education services, that the student did not need them, and they wanted to permanently decline special services. They also did not think there was a recent hearing test. The most recent IEP at Exhibit 8, pages 14 and 15 show a hearing test dated August 14, 2018 with result of normal hearing in the 250-1000Hz sloping to moderate/severe hearing loss bilaterally, with an adverse effect on his development of sounds and language. Also, IEP dated September 24, 2018 at page 16 of Exhibit 8 states student experienced an increase in tinnitus in both ears. Exhibit 15 report card for the sixth-grade shows Petitioner is mainly an A and B student.

8. 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.

9. It was not clear whether provision of false information was intentional, and the father said he misunderstood the question, thinking it referred to learning disabilities. Regardless, the information on the application was false or substantively misleading.

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

#### RECOMMENDED CONCLUSIONS OF LAW

11. Petitioner perfected his 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.

12. 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.

13. 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.

14. Respondent's policies provide for the rejection of an application for lack of capacity in a program and for false information on an application.

15. While Petitioner's father asserts the false information was not intentional, it was still false information which did not allow Respondent to assess capacity at the time of acceptance of the application.

16. 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.

17. 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 the student's belief that [redacted] did not need a hearing aid, because it hurt [redacted] ears, and [redacted] is doing well without it.

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

19. 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 this rescission of approval of Petitioner's application, nor that this rescission was arbitrary or unreasonable. Neb. Rev. Stat. § 79-238 (1) (Cum. Supp. 2018) provides that a school district may reject a previously accepted application on the basis of false or misleading information submitted by a parent if the rejection occurs prior to the student's attendance as an option student. Therefore, the determination of the Respondent school district in rejecting the previous approval for this application for option enrollment should be affirmed.

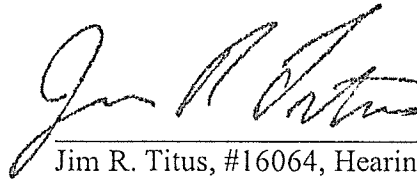
#### RECOMMENDED DECISION

The following is recommended by the Hearing Officer:

(a) That the Respondent School District's decision to reject Petitioner's previously accepted 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 this 3<sup>rd</sup> day of July, 2019.



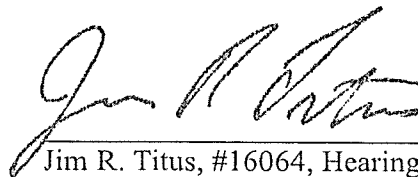
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CERTIFICATE OF SERVICE

I certify that on July 3, 2019, I served a true and correct copy of the foregoing order by email on the following parties:

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Jim R. Titus, #16064, Hearing Officer