

BEFORE DENISE JUNEAU, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,
STATE OF MONTANA

BOARD OF TRUSTEES, BELGRADE)	
SCHOOL DISTRICT NO. 44)	
)	OSPI 325-10
Appellant,)	
)	DECISION AND ORDER
vs.)	
)	
L. M., PARENT OF S.M.,)	
Student,)	
)	
Respondent.)	

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following decision and order:

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Respondent L.M.'s ("L.M.") child ("student") was suspended from school at the Belgrade School District ("District") on March 24, 2010. On April 2, 2010, L.M. received a Notice of Recommended Expulsion of the student from Herb Benz, Superintendent of the District. On April 11, 2010, L.M. asked the District to conduct a Section 504 evaluation¹ of the student. The District Board of Trustees ("Board") held a hearing on April 13, 2010, and voted to expel the student. On May 11, 2010, L.M. filed an "Appeal of Expulsion for [student]." On

¹ Section 504 evaluation refers to § 29 U.S.C. 794, the codification of Section 504 of the Rehabilitation Act of 1973.

May 14, 2010, Gallatin County Superintendent, Mary Ellen Fitzgerald, found that she had jurisdiction to hear the issues regarding the student's expulsion.

On May 19, 2010, a Section 504 eligibility meeting was held with District personnel and L.M. in attendance. The Section 504 team determined the student was not eligible for Section 504 accommodations.

On May 25, 2010, the District challenged the County Superintendent's assumption of Jurisdiction with a Motion to Dismiss.

On June 1, 2010, L.M. advised the District in writing he disagreed with the outcome of the Section 504 eligibility meeting and requested a review of the district's decision. A hearing before a hearing officer was scheduled for July 22, 2010.

County Superintendent Fitzgerald denied the District's Motion to Dismiss and reaffirmed her jurisdiction to hear the expulsion issue. The District appealed the matter of jurisdiction to the State Superintendent pursuant to ARM 10.6.104(4). The District then filed a motion to stay the proceedings pending the appeal of the issue of jurisdiction, which was granted by the State Superintendent, but with an expedited briefing schedule for the appeal.

L.M. filed a Motion to Partially Rescind the Order to Stay County Superintendent Proceeding Pending Appeal. The State Superintendent denied L.M.'s Motion by Order dated June 30, 2010.

The parties' have submitted their briefs and this matter is now at issue.

ISSUE ON APPEAL

Did the County Superintendent err in determining she had jurisdiction over this matter?

STANDARD OF REVIEW AND AUTHORITY

The State Superintendent of Public Instruction's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the

Montana Legislature in § 2-4-704, MCA, and adopted by the State Superintendent in ARM 10.6.125.

The State Superintendent may reverse or modify a county superintendent's decision if substantial rights of a party have been prejudiced because the conclusions of law and order are (a) in violation of constitutional or statutory provision; (b) in excess of the statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not made although requested. ARM 10.6.125(4).

A county superintendent's conclusion of law is reviewed to determine if the interpretation of law is correct. *Baldrige v Board of Trustees*, 264 Mont. 199, 870 P.2d 711 (1994).

CONCLUSIONS OF LAW AND OPINION

Issue No. 1. Did the County Superintendent err in determining she had jurisdiction over this matter?

A person aggrieved by the final decision of the board of trustees in a contested case may appeal that decision to the county superintendent. ARM 10.6.103(1).

The county superintendent has authority and jurisdiction to “hear and decide all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county.” Section 20-3-210, MCA. A contested case is “any proceeding in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing.” ARM 10.6.102(1).

Expulsion of the student was a decision of the board of trustees of the district and therefore is a controversy arising in the district. To fall under the definition of “controversy” the proceeding must involve a determination of legal rights, duties, or privileges of the student made after an opportunity for a hearing. The matter of a county superintendent's jurisdiction of a student's expulsion from school has been previously addressed by a former State Superintendent in *J.C. v. Board of Trustees of Great Falls Public Schools*, OSPI 314-07 (2008), citing *Kaptein v. Conrad School District.*, 281 Mont. 152, 931 P2d 1311 (1997); (student's right to participate in extracurricular activities is constitutionally protected.) The State Superintendent concluded if a

student's right to participate in extracurricular activities is constitutionally protected, the student's right to attend school and receive an education is also a constitutionally protected right.

A student's right to attend school is entitled to equal or greater constitutional protection than a student's right to participate in extracurricular activities...it follows that a county superintendent has jurisdiction to hear a student's appeal from a school board expulsion because it affects the student's right to attend school. *Id.* at 12.

The District concedes the County Superintendent would otherwise have jurisdiction over the matter of expulsion pursuant to § 20-3-210, MCA, but alleges because L.M. raised issues relating to a request for a Section 504 evaluation, the County Superintendent is disqualified from hearing the matter pursuant to § 20-3-211, MCA(4), which states: "A county superintendent may not hear or decide matters of controversy pursuant to 20-3-210 when the controversy involves the education or possible identification of a child with a disability."

"Child with a disability" as used in Title 20, MCA, means "a child evaluated in accordance with the regulations of the Individuals With Disabilities Education Act² as having a disability and who because of the disability needs special education and related services." Section 20-7-401, MCA. IDEA is not the federal law at issue in this matter. Although also related to special services for students, Section 504 is part a different federal Act with its own requirements and procedures. Section 504 requires school districts to have procedures to identify, evaluate and make reasonable accommodations for students identified with physical or mental impairment which substantially limit a major life activity and affect their educational opportunity.

In this situation, the Board does not have authority, and did not make a decision about the Section 504 evaluation. The 504 evaluation is not a "controversy as a result of a decision of the trustees of the district in the county." Section 20-4-210, MCA. As such, county superintendents do not have jurisdiction to review Section 504 decisions. This was the conclusion reached in *Jefferson High School District No. 1 v. Student ML*, OSPI 262-96, a State Superintendent decision relied upon in *Wolf Point v. D.B.*, OSPI 287-01. The *Jefferson High* decision reached the correct conclusion, but incorrectly cited and relied upon § 20-4-211(4), MCA. A county

² The most recent version of the Act is entitled: Individuals with Disabilities Education Improvement Act of 2004, and is codified at 20 U.S.C. 1400 et.seq. It is referred to as "IDEA."

superintendent does not have jurisdiction over Section 504 decisions because they are not decisions of the board of trustees, not by disqualification pursuant to § 20-4-211(4), MCA.

The primary issues in L.M.'s appeal, however, relate to the suspension and expulsion of the student. The District cites *Wolf Point* in support of its position that the County Superintendent does not have jurisdiction over the entire appeal because the issues related to expulsion are too intertwined with the Section 504 issues. In the *Wolf Point* case, it was alleged D.B. failed physical science because the district did not make accommodations for his temporary handicap. A primary allegation of "failure to make reasonable accommodations" raises Section 504 issues, which are not decisions of a board of trustees. The *Wolf Point* decision correctly held the county superintendent lacked jurisdiction to hear that Section 504 claim, but used an incorrect analysis of the law.

The other issue raised in the *Wolf Point* case was that D.B. was not allowed to play extracurricular sports in the fall because of a failing grade the previous spring. At the time the decision was issued, D.B. had made up the course by going to summer school, and the fall semester was over. The issue concerning whether D.B. should have been allowed to play fall sports was found to be moot and was dismissed because it was no longer relevant, not because it was intertwined with the Section 504 issue and could not be separated.

In this situation, a Section 504 team was convened in response to L.M.'s request for a Section 504 evaluation. A hearing regarding L.M.'s dissatisfaction with the initial decision is being heard in a separate administrative forum, governed by a separate administrative process. Whether the student should have been receiving accommodations, and whether the failure to do so has ramifications for the way the suspension and expulsion were handled by the District, may also be considered in the Section 504 hearing. It is typical and preferable that the question of Section 504 accommodations be resolved in the appropriate forum prior to a decision on extraordinary discipline, such as expulsion. The District's failure to previously resolve the Section 504 issue, however, does not remove the appeal of the student's expulsion from the County Superintendent's jurisdiction.

The County Superintendent correctly determined she has jurisdiction to hear the appeal of issues regarding the expulsion of the student from the Belgrade School District. She does not, however, have jurisdiction over the pending Section 504 matter, which is already in another administrative forum.

The District's appeal is dismissed and this case remanded to Superintendent Fitzgerald to proceed with the administrative procedures for a hearing on the issue of the student's suspension/expulsion from school.

DATED this 26th day of July, 2010.

/s/ Denise Juneau
Denise Juneau,
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 26th day of July, 2010, I caused a true and exact copy of the foregoing DECISION AND ORDER to be mailed, postage prepaid, to the following:

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/s/ Ann Gilkey
Ann Gilkey