BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

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BIGFORK PUBLIC SCHOOLS, SCHOOL DISTRICT NO 38, and its BOARD OF TRUSTEES, Appellants, vs. MICHAEL MEYER, Student, and JAMES MEYER and MAVIS MEYER, Parents, AIMEE BOLIVAR and KARRIE BOLIVAR, Students, and MICHAEL WHISTLER and JILL WHISTLER, Parents, BENITO RODRIGUEZ, Student, and SILVESTRE RODRIGUEZ and KATHY RODRIGUEZ, Parents, JESSICA OCKER, Student, Respondents/Cross Appellants.	OSPI 259-95 DECISION AND ORDER

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This is an appeal by Bigfork School District No. 38 [hereinafter "the Trustees" or "the District"] of an August 30, 1995, decision of Flathead County Superintendent of Schools, Donna Maddux. The County Superintendent held that the District violated the Due Process rights of Michael Meyer, Aimee Bolivar, Karrie Bolivar, Benito Rodriguez and Jessica Ocker [hereinafter "the Students"] when it expelled them after a Trustees' hearing on April 6, 1995. The Trustees, enforcing a "zero-tolerance" policy, expelled the Students because the High School principal found alcohol in the cars in which the

Students road to the High School Prom.

The Students did not dispute that they road in cars where alcohol was found. They argued that the process followed by the District violated their rights to Due Process and the County Superintendent agreed. The April 3, 1995, written notice of the expulsion hearing, sent to the Students and their parents by the high school principal, included a copy of the wrong district policy and procedure -- the parents prepared for the hearing using one document while the Trustees actually referred to another during the hearing. The County Superintendent also held that the Trustees erred by applying an unadopted zero tolerance policy when the District's written policy at the time of the hearing provided for progressive discipline. The Trustees adopted zero tolerance as district policy after the hearing.

While agreeing that the District's proceedings did not satisfy Due Process, the County Superintendent denied the Students' request for monetary relief or attorney fees. This is consistent with the holding of Scharler v. Whitehall School District, OSPI 239-94 (2/28/95), 14 Ed.Law 29. In administrative review of a decision by a school district to expel a student, the only remedy that either a county superintendent or this Superintendent can order is the opportunity to attend public school. Although the District never raised mootness, by the time of the County Superintendent's hearing, the Trustees' decision to expel the Students was moot. All the Students had completed the 1994-95 school year at Polson High School, the senior Students had received a diploma from Bigfork High School and the other Students were readmitted to Bigfork High School for the 1995-96 school year if certain requirements were satisfied (Agreed

Facts, County Superintendent's Pre-hearing Order, Page 2 (7117/95)).

The District, however, chose to defend its process for expelling these Students rather than argue the issue was moot. The County Superintendent did not agree with the District that the expulsion had satisfied Due Process requirements. The County Superintendent also ordered the District to:

> . . . expunge the student petitioners' school records of any reference to having been expelled. **A** single letter or recommendation to the institution of higher education of the petitioner's choice will be supplied.

County Superintendent Order, Page 11 (8130195).

The County Superintendent denied any monetary damages but the District appealed. The Students filed a cross-appealed of the County Superintendentk denial of monetary damages and attorney fees and seek an order directing the District to publicly apologize.

This office requested a copy of the record and, after reviewing numerous briefs from both parties, issues the following Order.

DECISION AND ORDER

The August 30, 1995, Order of the Flathead County Superintendent is AFFIRMED in part and MODIFIED in part. Substantial credible evidence supports the County Superintendent's findings that the District's policies were unclear, that the school administration and the Trustees were confused about what the District's policies were, and that the District gave the Students and their parents incorrect written notice prior to the disciplinary hearing. The County Superintendent is correct as a matter of law that the notice and hearing in this matter did not meet the minimum requirements of

Due Process. Any adverse effect of the denial of Due Process at the expulsion hearing was corrected, however, because these Students were not, in fact, denied a public education. The Polson High School District allowed them to complete the school year and the Bigfork District ultimately gave the students diplomas or allowed them to re-enroll. The August 30, 1995, Order correctly denies the Students' request for monetary damages and attorney fees.

The Order also correctly notes that the Students have received diplomas and/or credits. The Students were not, in fact, expelled, and the Order is correct that the District should remove any reference in their records to having been expelled.

The County Superintendent did not have the jurisdiction to order the District to provide a letter of recommendation for the Students and the August 30, 1995, Order is modified by striking that requirement.

STANDARD OF REVIEW

Findings of fact are reviewed to determine if they are supported by substantial, credible evidence in the record. The State Superintendent may not substitute her judgment for that of a county superintendent on the weight of the evidence. A finding is clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." Waoe Appeal v. Board of Personnel Appeals, 676 P.d. 194, 198, 208 Mont. 33, 40 (1984). Conclusions of law are reviewed to determine if the interpretation of the law is correct. Steer. Inc. v. Dept. of Revenue, 803 P.d. 601, 603, 245 Mont. 470, 474 (1990). The petitioner bears the burden of showing that he has been prejudiced by a clearly erroneous ruling. Terry v.

Board of Regents, 714 P.d. 151, 153, 220 Mont. 214, 217 (1986).

MEMORANDUM OPINION

A. Summary of relevant evidence. At the 1995 Bigfork High School prom the high school principal found alcohol in the back seat of a car. County Superintendent Order, FOF 3 and 4 (8/30/95). The Principal testified that:

> And then I decided at that time, well, since it was so easy to find the alcohol in one car that I would borrow her [a reserve officer's] flashlight some more and go around and look at all the cars, which I did, and I found three other automobiles with alcohol in the back.

Transcript of Hearing (TR), Page 36 (7/24/95).

On April 3, 1995, the Students, who came to the prom in the three cars, met with the principal. He suspended the Students and told them he was recommending the Trustees expel them at a board meeting to be held April 6, 1995. The principal sent the Students' parents a letter dated April 3, 1995, informing them that their child violated the district druglalcohol policy, that a hearing would be held April 6, 1995, and that the principal was recommending expulsion (Joint Exhibit 3). .The principal attached a copy of district procedure 2334P (Joint Exhibit 7), to the letter. A copy of the District's druglalcohol policy actually in effect at the time (Joint Exhibit 9) was not attached. TR 44-47.

At the County Superintendent hearing the Board Chair testified that, during the hearing, Trustees referred to the District's drug/alcohol policy (Joint Exhibit 9), although the parents had been provided the yet to be adopted procedure "2334P" (Joint Exhibit 7) to prepare for the hearing. The Board Chair testified:

Q The board meeting began on April 6, **1995;** is that correct?
A Yes.
Q And you had joint Exhibit Number "9" before you then, called the Behavior and Discipline with the options of the school board?
A Correct.
Q You did not give that to the parents, did you?
A No.
Q You did not hand that out to the students so they could know what the options were for the school board; is that correct?
A Correct.
Q All of the board members had this document before them? All the trustees?
A I'm uncertain.
Q But you had it in front of you?
A Yes.
Q Okay, Was it ever explained to the parents or the students, one two or three of the options?
A No.

TR **98.**

One factual dispute in this case was whether on April **3, 1995,** the Trustees had adopted a zero-tolerance policy for the District or, in fact, had a progressive discipline policy with options in effect on April **3, 1995.** A number of written documents discussing the consequences of students consuming alcohol existed -- the **1994-95** student handbook (Joint Exhibit **2);** the unadopted procedure referred to as "2334P" (Joint Exhibit **7);** the Drug Free School Policy adopted May 9, 1991 (Joint Exhibit **8);** and the District's drug/alcohol policy, adopted before August **26, 1985** (Joint Exhibit **9)**-- but the evidence establishes that the District did not adopt or clearly state a zero-tolerance policy until after the expulsion hearing.

Concerning district procedure 2334P (Joint Exhibit **7),** the high school principal testified

Q All right. And you indicated that a procedural number – Exhibit Number "7", identified as 2334P -- Do you now refer to that as a procedure rather than a policy?
A It's a procedure, correct.
Q It's not a policy of any kind?
A It's not a policy.
Q And you say you thought it was adopted when? You didn't have a date?
A I don't have a date. It was in effect for the 94-95 year.
Q Okay. The board minutes for April 6, 1995, which is Joint Exhibit Number "11" –

. . .

Q Do you recognize that as the minutes of the April 6 meeting before the board?
A Yes.
Q This is the same day that the children presented their case to the board; is that correct?
A Yeah, I guess so. Yes.
Q Would you turn to the third page, and next to the word "Policies," does it not say that the policies – and they give the exact number, 2334P, was presented and accepted for a first reading?
A Yes.
Q There had been no prior readings of 2334P then prior to April 6, 1995?
A Yes.
Q There were readings or there were not?
A No, you're right.
Q So the first time the board had read this Exhibit Number "7" was after the kids had been expelled? During the meeting?
A I guess so, yes.
Q Okay. Why then do you say that 2334P was in effect prior to April 6, 1995?
A Well, because as an administrative team, since it's a procedure, at least by – my understanding is that it does not have to be approved and it was put into process at the start of the school year.
Q Okay. So between you as administrator and the superintendent, you put it in yourself but there was no public disclosure or reading to the public; is that correct?
A Not that I'm aware of, right.

TR 45-47

The Board Chair testified that, although the District's adopted druglalcohol policy at the time of the hearing provided for progressive discipline, the Trustees had switched to a zero-tolerance policy. He reasoned that because the Board had applied the zero-tolerance policy to other students during the school year, it was the District's policy although it had not been formally adopted by the Board

> ***Q*** Okay. And it was your position then that since you had expelled other kids for violating the drug or alcohol provisions, that these five kids would have to face the same consequence so there would be enforcement without exception; is that correct?
> **A** Are you referring to myself as an individual?
> ***Q*** Yes.
> A I felt that if there were no mitigating circumstances, that they should face expulsion.

TR 102

B. Discussion of Conclusion of Law reaardina Due Process. Although expelled, ultimately the Students were not denied public education in school year 1994-95 or 1995-96 and the County Superintendent denied the Students any monetary damages. The District did not raise mootness, however, and filed this appeal, apparently seeking affirmation of the procedure it followed. This Superintendent agrees with the County Superintendent's conclusion that the District denied the Students Due Process. There is evidence in the record to support the County Superintendent's findings of fact concerning what procedure the District followed and the County Superintendent was right as a matter of law that procedure did not satisfy constitutional Due Process requirements

The District argues that because schools need to take a strong stance against

student alcohol possession, these Students received sufficient Due Process at their expulsion hearing. This is not how the question "how much process is due" is answered, however. The amount of process that a citizen is entitled to in dealings with the government depends on the importance of the citizen's interest at stake. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Matthews v Eldridae, 424 U.S. 319, 96 S.Ct 893 (1976). School districts have a legitimate interest in discouraging alcohol possession but the interest at stake at the April 6th hearing was these individual Students' right to a public education, not the Trustees' authority to adopt and enforce a zero-tolerance alcohol policy.

The interest at stake – education -- is an explicitly guaranteed Constitutional right in Montana. In Kaptein v. Conrad School District, 54 St. Rep. 106, 931 P.2d 1311 (1997), the Montana Supreme Court wrote:

> The United States Constitution, unlike the Montana Constitution, does not explicitly or implicitly guarantee a right to education.

Kaptein at 1313.

Arguably, the right to public education is the most significant claim on government that a minor possesses. A student and his or her parents are entitled to significant procedural protections before a school district can take away that right. At a minimum, they have a right to clear, accurate written notice of what school district policy was violated, notice of what evidence of the violation exists, notice of what procedure the school district intends to follow in conducting the hearing, and sufficient time to meaningfully prepare for the hearing.

The District's proceedings did not meet these minimum requirements. The April 3, 1995, letter did not give the Students or their parents clear notice of what district policy was violated or what evidence existed that would be presented to the Trustees. The District sent home a copy of an unadopted procedure (Exhibit 7), not a copy of the District's policy at the time of the violation (Exhibit 9). TR 44-47. There was less than 3 days to prepare for the hearing. At the hearing, the Trustees used copies of the adopted policy at the time of the hearing, not the procedure that had been provided to the parents. TR **172,** 173. The District's attempt to correct this error by adopting the procedure after the disciplinary hearing on April 6, 1995, did nothing for these Students' procedural rights and may have heightened the sense of unfairness.

The Students also contended, and the County Superintendent agreed, that there was confusion at the time of this incident concerning what the District's discipline policy on alcohol was (FOF 6). Evidence in the record supports that finding. The principal and the Board Chair testified that the District had a zero-tolerance policy but the District's 1994-95 student handbook states that Bigfork High School students who participated in extracurricular and co-curricular activity and consumed alcohol were subject to progressive discipline starting with:

> . . . suspended for eleven (11) school days from all activities. The student will be allowed to practice, but not participate in any interscholastic event during this time.

Exhibit A.

How could the District enforce zero-tolerance through expulsion and suspend students from activities at the same time? Were students expelled from school but still

allowed to participate in extracurricular activities? The High School principal testified that he harmonized these statements to mean that if a student consumed alcohol at school or a school related activity he or she would be expelled but if she or he consumed alcohol at some other time he or she was subject to progressive discipline in extracurricular activities. TR 79-80.

If the District did, in fact, harmonize its policy statements in Exhibits A, 7 and 9 in this manner, the Trustees at the April 6, 1995, hearing should have been willing to consider the question of whether or not driving to the prom was a school related activity. This did not happen. At least two trustees testified that they applied a zero-tolerance policy – if the District had knowledge that a student possessed or consumed alcohol he or she was expelled. This was contrary to the written policies of the District at the time of the expulsion hearing.

C. Other Issues. **1.** The District argues that "the students have waived any right to allege that the District violated Section 20-5-202, MCA." District's Initial Brief, Page 5. Section 20-5-202(1), MCA, provides students with statutory protection from the type of procedure the Bigfork District followed. It states in part:

> As provided in 20-4-302, 20-4-402, and 20-4-403, a pupil may be suspended by a teacher, superintendent, or principal. The trustees of the district shall adopt a policy defining the authority and procedure to be used by a teacher, superintendent, or principal in suspending a pupil and defining the circumstances and procedures by which the trustees may expel a pupil. Expulsion is a disciplinary action available only to the trustees. (Emphasis added.)

The District argues that because it had stipulated that the issue to be heard was "Whether the petitioners and students constitutional rights have been violated"

(District's Initial Brief, Page 5), the County Superintendent could not consider whether the District had adopted policies and procedures for expelling students as required by § 20-5-202.

The issue to which the District argues that the parties stipulated, does not appear in the pre-hearing order and nothing in the record indicates the Students waived their statutory right. Section 20-5-202 is a requirement imposed on school districts by the Montana Legislature. Students enrolled in a school do not have the power to "waive" the Legislature's requirements.

2. Findings of Fact 5 and 6. There is substantial credible evidence to support FOF 5 and 6. Exhibits 3, 7, 8 and 9 and the testimony of the High School Principal and two Trustees support these findings.

3. The District argues that the County Superintendent failed to make requested findings on matters essential to a decision. The District filed 46 proposed Findings of Fact (Document # 20, County Superintendent Docket). The County Superintendent considered them and wrote:

> The parties proposed many Findings of Fact; those not found are rejected as either irrelevant or not supported by the preponderance of the reliable, probative and substantial evidence. State ex rel. Montana Wilderness Assoc. MT 648 P.2d 734 (1982).

County Superintendent Order, Page 11

The County Superintendent's Order had sufficient findings on matters essential to the decision and considered the findings proposed by the District. She did not fail to make findings on matters essential to the decision.

4. The District argues that Conclusions of Law 10, 11, 12, 13 and **14** were arbitrary, capricious and an abuse of discretion. While some of these conclusions could more accurately be characterized as findings of fact, they are supported by evidence in the record. Conclusion of Law 13 is the essence of the Order. It states:

> Expulsion is the most serious punishment a school can assign to a student. It must be levied in a manner to demonstrate that the District recognizes the gravity of the consequences on a young life and the lives of the student's parents. Where the future of minor children is involved, it is imperative that parents have identical information to that available to the School Board and its District Administrators.

County Superintendent Order, Page 10.

This conclusion is not arbitrary, capricious or an abuse of discretion. It is a correct statement of law.

5. The District argues that the County Superintendent exceeded her statutory authority by directing the District to write a letter of recommendation on behalf of each student. The Students, on the other hand, argue that the County Superintendent should have gone further and required the District to conduct a public ceremony and make a formal apology. (Respondents' Notice of Cross Appeal, Page 2 (9/28/95))

The District is correct that the County Superintendent exceeded her authority by directing the school district to write letters of recommendation. A county superintendent does not have the power to compel any individual to write a positive recommendation about another or hold ceremonies or give apologies. These are not administrative or legal remedies. The Students are incorrect that the County Superintendent has the power to award attorney fees or direct the school district to pay

monetary damages.

6. The Students raise the argument that pendent jurisdiction exists in State District Court to hear a federal claim under § 42 U.S.C. 1983. That argument is irrelevant to this appeal, however, because a county superintendent administrative hearing is not State District Court. County superintendent jurisdiction is based on a State statutory grant to hear and decide school controversies arising as a result of decisions of the trustees (§ 20-3-210, MCA). County superintendents issue administrative decisions, not judgments. In this case, all of the Students did, in fact, attend public school in 1994-95 and did not suffer the loss of any state rights as a result of the District's action. In an appeal of trustees' decision to expel, the only remedy that either the county superintendent or this Superintendent can order is the opportunity to attend public school. Scharler v. Whitehall School District, OSPI 239-94 (2/28/95), 14 Ed.Law 28.

CONCLUSION

Substantial credible evidence supports the County Superintendent's finding of fact and the conclusions of law are correct as a matter of law. The order is AFFIRMED except for the requirement that the District provide a letter of recommendation for the Students. The August 30, 1995, Order is MODIFIED by striking that requirement.

DATED this 5 day of October, 1998.

Nancy Keenan

NANCY KEENAN

BIGFORK.259

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 6TH day of October, 1998, a true and exact copy of the foregoing DECISION AND ORDER was mailed, postage prepaid, to the following:

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