

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

BUTTE SCHOOL DISTRICT NO. 1,)	
)	
Appellant,)	OSPI 334-13
)	
vs.)	DECISION AND ORDER
)	
KRISS and CASSIE CAPRARA, as parents of)	
K.C. , a minor,)	
)	
Respondents.)	

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

PROCEDURAL HISTORY

K.C. is a student enrolled in the Butte Public School system. On or about September 5, 2012, K.C. was suspended from school for violation of the district's drug policies. On October 1, 2012, the attorneys for K.C. and the school district entered into a Stipulation where K.C. admitted there was sufficient evidence for the board to find that K.C. was in possession of dangerous drugs and sold or gave illicit drugs to two students at Butte High School.

The Board of Trustees voted to expel K.C. from Butte High School for one year with educational opportunity provided to K.C. at the District's expense.

Respondents' appealed the Board's decision to the Butte-Silver Bow County Superintendent. Following discovery and a hearing, the County Superintendent issued Findings of Fact, Conclusions of Law and an Order dated February 4, 2013 directing that "K.C. be allowed to return to Butte High School immediately."

The Butte School District appealed the Butte-Silver Bow County Superintendent's Order on March 1, 2013. The parties have submitted their briefs and this matter is at issue.

Procedures related to the action before the District Court are not relevant to the issues before the State Superintendent and will not be addressed in this decision.

STATEMENT OF FACTS

1. Appellant is a K-12 school district governed by its elected board of trustees.
2. Respondent, K.C., is a student at Butte High School.
3. On September 4, 2012, Butte High Athletic Director, Charles Merrifield received a letter alleging that two Butte High students – not K.C. - were using drugs and selling/providing them to Butte High football players.
4. During an investigation by Butte High administrators, two students stated that they had received marijuana from K.C.
5. The investigation also revealed that on September 5, 2012, K.C. “possessed” drugs in his vehicle parked within “line-of-sight” of the Butte High School campus.
6. Butte School District Policy 3310 provides that disciplinary action may be taken against any student guilty of gross disobedience or misconduct, including, use, possession, distribution, purchase or sale of illegal drugs or controlled substances “whenever a student’s conduct is reasonably related to school or school activities” including on, or within sight of, school grounds.
7. Simultaneously with the district’s investigation, K.C. was being investigated and prosecuted by Butte-Silver Bow law enforcement officials on drug charges.
8. Principal, John Metz, submitted an “expulsion packet” to a panel comprised of four Butte school district administrators for a recommendation of disciplinary action.
9. Following the review of the expulsion packet, the administrative panel recommended to the board of trustees that K.C. be expelled for a period of one year.
10. On October 1, 2012, K.C. and the District entered into a Stipulation regarding the expulsion hearing before the board of trustees.
11. K.C. stipulated that “there is sufficient evidence for the Board of Trustees of School District No. 1 to find that [student] committed the acts described above [possession of dangerous drugs and giving or selling illicit drugs to two students at Butte High School, which violate the District’s drug policies] while a student at Butte High School.”

12. K.C. further stipulated that the board, in its “discretion, [had] the right, but not the duty, pursuant to school district and Butte High School policy, to impose appropriate discipline for [student’s] actions” up to and including expulsion.
13. Prior to the disciplinary hearing counsel for the parties agreed that Principal Metz and District Superintendent Judy Jonart would give their verbal recommendations as to the appropriate discipline for K.C.’s admitted violation of the district’s drug policy, and that their recommendations would be subject to challenge by board members, but would not be subject to cross-examination.
14. At the disciplinary hearing, the Board Chairman explained that because of the Stipulation signed by the parties, the Board would dispense with the first phase of a typical disciplinary hearing (determination of guilt), and proceed to the punishment phase of the expulsion hearing.
15. The parties stipulated that K.C. could call as many witnesses as he desired to give their recommendations to the Board on how to deal with K.C.’s admitted violation of district policies and that the witnesses would not be placed under oath or be cross-examined.
16. At the hearing before the board, Metz recommended that K.C. be expelled for a period of one year and recited the details and circumstances surrounding the investigation of K.C. as an explanation for his recommendation.
17. K.C.’s counsel did not object to the procedure outlined by the Board chair, nor did he object to Metz’ recommendation or explanation of his recommendation.
18. Jonart recommended that K.C. be expelled for a period of one year with an educational opportunity provided by the District to graduate early.
19. K.C., his parents and his counselor gave statements to the board.
20. After hearing the statements of the parties, the Board asked if Jonart or Metz wished to change their recommendations. Metz stated that he would change his recommendation to include the provision of educational services.
21. The Board deliberated and voted to expel K.C. for one year based on a “finding of gross misconduct with educational opportunities to be provided at an off-site location and to work with [student’s] parents to provide that off-site location so that [student] could graduate early.”
22. K.C. and his parents appealed the Board’s decision to the County Superintendent.
23. At the hearing before the County Superintendent on January 25, 2013, K.C.’s attorney stipulated that notice of the proceedings was not an issue in this case.

24. Following a hearing before the County Superintendent, the County Superintendent entered Findings of Fact, Conclusions of Law and an Order directing that: “[student] be allowed to return to Butte High School immediately.”
25. Subsequent proceedings before the District Court were filed, but are not at issue here.

ISSUES ON APPEAL

- I. Whether the County Superintendent had jurisdiction to hear the claims raised by Respondents, including the constitutional claims.
- II. Whether the County Superintendent erred by not ruling on Appellant’s Motion to Dismiss the Appeal for Lack of Jurisdiction and Motion to Dismiss the Amended Notice of Appeal.
- III. Whether the County Superintendent erred by overturning student’s expulsion.

STANDARD OF REVIEW AND AUTHORITY

The 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, Montana Code Annotated (MCA) and adopted by the Superintendent of Public Instruction in Administrative Rules of Montana (ARM) 10.6.125.

The Superintendent of Public Instruction may reverse or modify the 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 conclusions of law are reviewed to determine if the interpretation of law is correct. *Baldrige v Board of Trustees*, 264 Mont. 199, 870 P.2d 711 (1994). A county superintendent’s findings of fact are reviewed to determine whether they are clearly erroneous. *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). The Montana Supreme Court has described the review of the clearly erroneous standard

as three “prongs:” Are the findings supported by substantial evidence? If there is substantial evidence to support a finding, did the trier of fact misconstrue the effect of the evidence? And if not misconstrued, a court may still determine a finding as “clearly erroneous” when “a review of the record leaves the court with the definite and firm conviction that a mistake has been committed.” *Interstate Production Credit v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991) (internal citations omitted).

CONCLUSIONS OF LAW AND OPINION

Issue I: Whether the County Superintendent had jurisdiction to hear the claims raised by Respondents.

Montana law provides that “except for disputes arising under the terms of a collective bargaining agreement or as provided under 20-3-211 or 20-4-208, the county superintendent shall hear all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county.” 20-3-210, MCA

Montana administrative rules provide that school controversy means a contested case or “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 a hearing.” ARM 10.6.102

Montana law further provides that, “school district trustees are required to adopt policies “defining the authority and procedure to be used ... in the suspension of a pupil and in defining the circumstances and procedures by which the trustees may expel a pupil and that, “expulsion ... is a disciplinary action available only to the trustees. 20-5-202, MCA

The issue before the State Superintendent was as a result of a decision of the trustees to expel K.C. and involves a determination of whether the District violated K.C.’s legal rights to educational opportunity, due process of law, and a fair hearing.

District policy #3310, provides “the Board will grant a hearing for any student subject to an expulsion.”

The District argues that the County Superintendent did not have jurisdiction to hear this matter because the of the claims of violation of student’s constitutional rights to due process and equal protection and raised this issue in its Motion to Dismiss Appeal and Motion to Dismiss Amended Notice of Appeal. The County Superintendent accepted jurisdiction by an undated

letter hand marked as being delivered November 25, 2012. Pursuant to ARM 10.6.104, the District had the right to immediately appeal the jurisdiction issue, but did not avail itself of that opportunity.

The District relies on *Jarussi v. Board of Trustees of School District No. 28* (1983), 104 Mont. 131, 135-136, 664 P.2d, 316, 318 to support its argument. *Jarussi* was based on a claim of violation of open meeting laws, which specifically grant the right to the District Court to provide relief from decisions made at an unlawfully closed meeting.

The Intermediate Court of Appeals of Hawai'i in *Aetna Life Insurance Company v. Park*, (1984) 5 Haw.App. 115, 678 P.2d 1101, citing *Jarussi* held, “[w]e agree with the holding of the overwhelming majority that an agency cannot use the powers which flow entirely from its governing statute to adjudicate the constitutionality of its governing statute.”

Simply because the appeal raised concerns about due process and equal protection does not remove it from the jurisdiction of the County Superintendent. This case is not about the constitutionality of statute or rule. It is not about whether the board of trustees had the authority under Montana law to expel a student. It is about whether or not the District followed their policies in expelling K.C. and if the County Superintendent has the jurisdiction to hear expulsion issues.

Expulsion of a student is under the discretion of a board of trustees in Title 20, MCA, is considered a contested case pursuant to administrative rule, and is subject to the jurisdiction of the County Superintendent.

The State Superintendent finds that the requirements of Montana law have been met and the County Superintendent had jurisdiction to hear this matter.

Issue No. II: Whether the County Superintendent erred by not ruling on Appellant’s Motion to Dismiss the Appeal for Lack of Jurisdiction and Motion to Dismiss the Amended Notice of Appeal.

The District filed its Motion to Dismiss Appeal for Lack of Jurisdiction on October 18, 2012. K.C. filed his Amended Notice of Appeal on November 2, 2012. The District filed its Motion to Dismiss Amended Notice of Appeal on November 13, 2012. K.C. did not respond to either Motion to Dismiss and is not required to do so. It appears that sufficient time passed to allow for replies before the County Superintendent made her decision. It is further not a

requirement of ARM Title 10, Chapter 6 that a County Superintendent hold a hearing on a Motion to Dismiss.

The District alleges that the County Superintendent “delayed her ruling on the Amended Motion to Dismiss, thereby depriving the District of its right to appeal under 10.6.104.ARM.” ARM 10.6.104 specifically provides that “the county superintendent shall, at all times, have jurisdiction to determine the jurisdiction over any particular contested case.” It further provides, “a determination by the county superintendent as to jurisdiction may be immediately appealed to the State Superintendent.”

The District had the right to appeal the jurisdiction determination following its receipt of the “Acceptance of Notice of Appeal dated October 11, 2012,” which is marked as delivered on November 25, 2012. There is nothing in the record on appeal which indicates that the District attempted to file an appeal or was denied the right to appeal the determination of jurisdiction. Further, as the District points out, subject matter jurisdiction may be raised at any stage of the proceedings. If the tribunal has no jurisdiction the matter may be dismissed at any stage in the legal proceedings. It has been determined that the County Superintendent did have jurisdiction to hear this matter and as such, the District was not prejudiced or harmed by any alleged failure to adhere to procedure.

The State Superintendent finds that the County Superintendent did rule on the Motion to Dismiss by notifying the parties she was accepting the appeal. Furthermore, the State Superintendent finds that the County Superintendent correctly assumed jurisdiction of the appeal.

Issue No. III: Whether the County Superintendent erred by overturning K.C.’s expulsion.

Based on the recommendations of a review panel of Butte school district administrators, Butte High School Principal Metz and Butte District Superintendent Jonart to expel K.C. for violation of the District’s drug policies, the Butte District Board of Trustees held a hearing on October 1, 2013. Prior to the hearing, and because of the concurrent criminal investigation, attorneys for the District and K.C. entered into a stipulation on behalf of their clients. In the stipulation K.C. admitted there was sufficient evidence in the Board’s possession which would justify a finding that he had committed the acts described in the stipulation and that those acts violated the District’s drug policies.

The acts described in the Stipulation were:

- Student had dangerous drugs in his possession in his vehicle which was located in line of sight from Butte High School, and
- It had been reported to District administrators that student sold or gave illicit drugs to two students at Butte High School.

The parties also agreed on how the disciplinary hearing would proceed. K.C. agreed to admit guilt and therefore the Board would dispense with the first phase of the hearing – determination of guilt. They agreed that Metz and Jonart would give their recommendations as to the discipline to be given, and that neither party’s witnesses would be under oath and neither party would cross-examine witnesses for the other party, but that the Board could ask questions. This agreement was reiterated by the Board chair in her summary of the process prior to the start of the punishment phase of the hearing. No one objected to the procedure as outlined by the Board chair.

K.C. claimed a violation of due process rights for not being able to cross-examine witnesses, specifically Principal Metz. However, K.C. voluntarily admitted guilt and agreed that witnesses would not be under oath or cross-examined by either party. He also alleges that he did not receive certain documents prior to the hearing, but he does not specify what documents he did not receive. Policy 3300P requires that the student and his parents receive notice of the expulsion action prior to an expulsion hearing. Student’s attorney stipulated before the County Superintendent that notice was not an issue in this case.

K.C. alleges Metz went beyond the Stipulated agreement by providing his reasons for the recommendation of expulsion, characterizing the violations of district policy in detail. However, at no time did student’s attorney object or attempt to stop the proceedings. Witnesses testified for K.C. asking that he be given another chance and not be expelled. The minutes of the Board’s disciplinary hearing reflect Board members asked questions of all witnesses. The testimony of the Board members at the hearing before the County Superintendent reflects that each one took their responsibilities seriously and they viewed the violations as serious offenses. Testimony showed none of them had been in an expulsion hearing and the admitted reluctance of some of them to go so far as expulsion. It is unreasonable to assume that, prior to voting to expel a student for a year, the Board members would **not** be informed about the circumstances surrounding student’s immediate suspension and recommendation for expulsion from school.

Nor was it beyond the language of the Stipulation for Principal Metz to explain his reasons for recommendation for expulsion versus some lesser level of discipline.

K.C. takes the position that there is no evidence that the distribution of drugs took place on or within line of sight of district property and therefore student was guilty only of possession of drugs, similar to other students at Butte High, none of which had been expelled. K.C. also argues that Metz's comments about the "large amount" of drugs was without foundation and biased the Board in their decision to expel K.C. Based on these arguments, K.C. asserts that expulsion was not appropriate. However, in the stipulation, K.C. admitted there was enough evidence to justify the Board finding that he had committed the act of selling or giving illicit drugs to two students at Butte High School.

K.C. also stipulated that the Board had the right, in its discretion, to impose appropriate discipline for the violation of District policies, up to and including expulsion. The stipulated agreement for consideration by the Trustees contained "whereas" clauses which stated (among other things): K.C. "did have in his possession dangerous drugs which were located in his vehicle, which was parked in line of sight from Butte High School" and "it has also been reported to . . . the Administration of Butte High School that [K.C.] sold or gave illicit drugs to two (2) students at Butte High School[.]" The Stipulation goes on to say that K.C. "acknowledges, without admitting criminal guilt, that there is evidence in the Board's possession which would justify the Board of Trustees of School District No. 1 finding that he has committed the acts described above, which violate the Butte High School and School District drug policies[.]"

It was reasonable for the trustees to interpret "acts" as reference to both the possession of drugs and the distribution of drugs at the high school. However, even without the Stipulation agreeing to the commission of "acts" and agreeing that expulsion was within the Board's discretion, the District's policy allows for discipline by the Board of Trustees - up to expulsion - for possession of drugs alone, without qualification of the amount of drugs possessed and without distribution at school.

The initial recommendation of the review panel and Metz was for K.C. to be expelled for one year. Jonart's recommendation was for expulsion with the provision of educational services. Following witness testimony Metz changed his recommendation and agreed with Jonart that K.C. should be given educational services so he could graduate earlier than he would if he had to

return to school following the one-year expulsion. Following the recommendation of six experienced school administrators, the Board voted to expel K.C. for a year, but added the requirement that educational services be provided off campus, at District expense with District staff providing the services.

Pursuant to Montana law, a board of trustees is the only entity authorized to expel a student from school. That same law requires boards to adopt policies “defining the circumstances and procedures by which the trustees may expel a pupil.” § 20-5-202, MCA. The District has policies detailing violations of school policy which could result in expulsion and the procedure for handling expulsions.

A student facing expulsion from public education has the right to due process of law. *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954); *Goss v. Lopez*, 419 U.S. 565, 576, 95 S. Ct. 729, 737 (1975). After an additional preliminary step of a panel review by district administrators prior to the Board hearing on the matter, the Board followed its expulsion policy by holding a fair hearing, the process for which was predetermined by the stipulation and agreement of the parties. The Board had the discretion to determine what the student’s punishment would be. K.C. admitted violations of school drug policies, voluntarily gave up his right to swear in or cross examine witnesses, and stipulated that expulsion was one of the options open to the Board.

The Board’s policies did not provide for a mandatory progression of discipline based on first offense/second offense, etc. and therefore was not under any obligation to give K.C. lesser punishment. The Board did take into consideration student’s academic record, discipline record, and how close he was to graduation in imposing the punishment of expulsion with the offer of educational services to allow him to graduate.

K.C. further claimed he was not afforded equal protection based on the fact that no other student had been expelled from Butte High School for violation of drug policies and no other students had been disciplined as a result of the incident at issue in this case. Other violations of Board policy by other students cannot be addressed at this time by the State Superintendent. The facts of those disciplinary issues are not part of the record in this case. It is clear from the record however, that District administrators and trustees followed policy and procedure in making a recommendation of expulsion and seriously considered the appropriate punishment based on the stipulated “acts” of K.C..

The State Superintendent finds that there was sufficient evidence before the Board to show a violation of District drug policies and the Board had the discretion in their policies, and as stipulated to by the parties, to impose the punishment of expulsion. Further, the record shows that the Butte School District Board of Trustees provided K.C. with a fair and impartial hearing as required by law and stipulated to by the parties.

The County Superintendent's findings and conclusions of law are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. The County Superintendent's Order overturning the expulsion is reversed.

It is noted that Superintendent Jonart's letter to K.C. following the Board of Trustee's decision to expel K.C. for a year, states that if K.C. has not taken advantage of early graduation, he may re-enroll at Butte High School in the fall of the 2013-2014 school year.

DATED this 28th day of June, 2013.

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

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 28th day of June, 2013, I caused a true and exact copy of the foregoing NOTICE AND BRIEFING SCHEDULE to be mailed, postage prepaid, to the following:

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