BEFORE LINDA McCULLOCH, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

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L.O. parent on behalf of C.O., a Minor Appellant, v. PLENTYWOOD SCHOOL DISTRICT NO. 20 Respondent.	)	OSPI 308-06 DECISION AND ORDER

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Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following Decision and Order.

DECISION AND ORDER

L.O. on behalf of C.O. (hereinafter "Appellants") appeal of the October 5, 2006 Findings of Facts, Conclusions of Law and Order of Shirley Isbell, Acting Sheridan County Superintendent of Schools is AFFIRMED.

PROCEDURAL HISTORY

On January 19, 2006, the Plentywood School District Board of Trustees (hereinafter "District") voted to suspend and exclude C.O. from co-curricular activities for a period of 90 days. Appellants filed a Notice of Appeal of that ruling with the Sheridan County Superintendent on February 17, 2006.

The parties waived hearing on the matter and submitted the issues on appeal to the Acting Superintendent on briefs. The Acting County Superintendent issued her Order on October 5, 2006. Appellants filed a Notice of Appeal with the State Superintendent on November 6, 2006.

ISSUES ON APPEAL

The issues on appeal are:

1. Whether the district's policy violates the U.S. Constitution's First Amendment Rights: Freedom to Assemble and Freedom of Expression?

2. Whether C.O. has a constitutionally protected right to participate in co-curricular activities.

3. Whether the district's policy is void on its face as vague and unenforceable.

4. Whether the school district violated the equal protection clause of the Montana Constitution.

5. Whether the district violated the right to privacy.

6. Whether the district violated C.O.'s due process rights.

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed to determine if the correct standard of law was applied. *Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan,* 241 Mont. 274, 277, 786 P.2d 1164, 1166 (1990) and *Steer, Inc. v. Dept. of Revenue,* 245 Mont. 470, at 474, 803 P.2d 601, 603 (1990).

The State Superintendent may reverse or modify the county superintendent's decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are (a) in violation of constitutional or statutory

provisions; (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. Admin. R. Mont. 10.6.125(4).

STATEMENT OF FACTS

It is difficult to determine the facts of this case because no hearing was held before the Acting County Superintendent based upon the waiver of their right to a hearing by both parties. The parties stipulated to a very limited set of facts. The Acting County Superintendent adopted facts from *C.A. v. Plentywood Schools, OSPI 307-06.* Seeing no objection by either party in their briefs on appeal, the State Superintendent will adopt relevant facts from *C.A./Plentywood* as well as relevant portions of the facts stipulated to by the parties on August 14, 2006. [References are to the *C.A./Plentywood* hearing transcript]

However, the State Superintendent will take this opportunity to instruct county superintendents that they are required by ARM 10.6.104(3) to "hear the appeal and take testimony in order to determine the facts related to the contested case." Although it may be argued that the parties can agree to waive the right to a hearing, it is difficult to render a decision based on "facts" when there are very few "facts" appropriately entered into the record. The State Superintendent strongly discourages this practice.

1. C.O. was a junior at Plentywood High School during the 2005-06 school year.

2. Students at the district's schools, including CO, were given copies of the Student Handbook at the beginning of the school year. (TR. P. 91, l. 1-6) No allegation

has been made that CO did not receive a copy of the Student Handbook.

3. On January 3, 2006 district teachers overheard students discussing a party that had allegedly occurred on December 31, 2005 at which alcohol was served. Names of several students were mentioned as having attended the party. The teachers advised district administrators of this information. (Tr. p. 30, l. 5-14)

4. High school principal Rob Pedersen and Activities Director Larry Henderson conducted an investigation into the incident because some of the students named were involved in co-curricular activities and the district had a policy against students involved in co-curricular activities using or being at gatherings where alcohol or illegal drugs were used. (Plentywood High School Student Handbook, Policy C-1, CCUP)

5. Several students were interviewed by Pedersen and Henderson, including CO. (TR, p. 123, l. 23 - p. 124, l. 11)

6. CO admitted that she had been at the party to hear a band consisting of three of her classmates.

7. On January 6, 2006 district administrators determined that CO was in violation of the CCUP and suspended her from co-curricular activities.

8. On January 11, 2006 CO and her parents were notified by letter that district administrators had recommended to the Board of Trustees that CO be excluded from co-curricular activities for a period of 90 days for violation of the CCUP. CO and her parents were notified that the Board would hear the matter at a special Board Meeting to be held January 18, 2006 to determine if the recommended exclusion would be approved by the board.

9. At the hearing on January 18, 2006, Mr. Bennett, the district superintendent, recommended that CO be excluded from co-curricular activities for 90 days for violation of the CCUP.

10. Neither CO nor her parents appeared at the hearing on January 18, 2006. Appellants allege that they appealed the "suspension of [CO] by letter to the Board," however, no such letter was admitted into evidence.

11. The Board of Trustees voted to exclude CO from co-curricular activities for a period of 90 days.

12. L.O., on behalf of CO appealed the Board's decision to the Sheridan County Superintendent.

13. Shirley Isbell, Acting Sheridan County Superintendent entered her order on October 5, 2006 finding for the District on all issues except the issue of whether this violation was a first or second offense.

14. L.O., on behalf of CO appealed the Acting County Superintendent's decision to the State Superintendent.

MEMORANDUM OPINION

The State Superintendent finds that Issues 1, 2, 4, and 5 are constitutional issues over which the County Superintendent has no jurisdiction and therefore dismisses those portions of Appellant's appeal for lack of jurisdiction.

Issue 3: Whether the district's policy is void on its face as vague and unenforceable

The State Superintendent affirms the County Superintendent's finding that the policy is not void on its face as vague and unenforceable and agrees in this case that "all that is required of a policy is for a reasonable person to be able to understand its meaning." No evidence was submitted to indicate that Appellant did not understand the policy. Indeed, as a participant in many extra curricular activities, she had ample opportunity to clarify any parts of the policy which were vague to her. In addition, she had been disciplined under the precursor to the present policy and no evidence was submitted that she raised the issue of vagueness at that time.

Issue 6: Whether the district violated C.O.'s due process rights

It should be noted that due process was afforded to C.O. by way of the hearing before the Board. Appellants chose not to take advantage of that opportunity; they did not appear or present evidence at the hearing. Appellants again put aside their right to due process by waiving their right to a hearing in this matter before the County Superintendent. A hearing before the County Superintendent would have provided them the opportunity to introduce facts into evidence to establish their arguments as stated in the issues on appeal.

The State Superintendent finds that there is sufficient evidence upon which to conclude that Appellants were granted due process in this matter.

As to the issue of whether C.O. should have received a first or second offense violation, the State Superintendent affirms the County Superintendent's determination that the December 31, 2005 violation was a first offense based on the facts submitted by Appellants and not refuted by the District.

DATED this 24th day of July, 2007.

/s/ Linda McCulloch
Linda McCulloch
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 25th day of July, 2007, 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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