

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

D.W., for K.W.,)	
)	
Respondent,)	OSPI 330-11
)	
vs.)	DECISION AND ORDER
)	
WHITEHALL PUBLIC SCHOOL)	
DISTRICTS Nos. 4, 47 and 2,)	
)	
Appellant.)	

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

K. W., a high school student, was enrolled at the Whitehall Public School District for the 2010-2011 school year. On March 3, 2011, K.W. and two other boys were observed smoking on school grounds. Following an investigation by the principal, Doug Richards, K.W. was suspended. That same day Principal Richards sent a letter to K.W.'s parents informing them that he was recommending K.W. be expelled for the remainder of the school year. Principal Richards' investigation had revealed that all three boys were smoking marijuana on school grounds and K.W. had supplied the drug. The letter advised K.W.'s parents that a hearing before the Whitehall Board of Trustees would be held March 9, 2011. The letter advised K.W. and his parents of his due process rights and the procedure that would be followed by the Board.

A hearing was held before the Board on March 9, 2011. K.W. and his parents were given the opportunity to present K.W.'s version of what occurred, present their own witnesses, and cross examine witnesses. At the conclusion of the hearing the Board voted to expel K.W. for the remainder of the 2010-2011 school year.

K.W. immediately appealed the Board's decision to the county superintendent. The District then filed a Motion with the county superintendent asking for a more particular statement

from K.W. The county superintendent issued a Notice of Ruling on May 9, 2011, denying the District's Motion for a more particular statement and accepting jurisdiction of K.W.'s appeal. The Board appealed the county superintendent's ruling on their Motion to the Superintendent of Public Instruction. On May 19, 2011, the Superintendent of Public Instruction denied the District's Motion. Having accepted jurisdiction, the county superintendent held a *de novo* hearing on May 24, 2011.

On June 14, 2011, the county superintendent issued a Decision and Order, ruling: "the District will expunge the student petitioner's records of any reference to having been expelled, and be given the opportunity to attend public school."

On July 6, 2011, the Superintendent of Public Instruction again received a Notice of Appeal from the District appealing the county superintendent's decision. The Superintendent of Public Instruction issued a Notice and Briefing Schedule, the parties submitted briefs, and this matter is now at issue.

ISSUE ON APPEAL

Did the county superintendent err in determining that K.W.'s expulsion should be expunged from the record?

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. *Baldridge 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

I. Did the county superintendent err in determining that K.W.'s expulsion should be expunged from the record?

Yes, the county superintendent erred in determining that K.W.'s expulsion should be expunged from the record. The Board raised specific allegations of error by the county superintendent, which are addressed individually below.

A. Did the county superintendent err in concluding the Board violated ARM 10.55.701 because it did not include the parents "as full partners in the decisions that affect children and families?"

The county superintendent's Statement of Facts concludes "the Whitehall Board decision to expel the student did not follow board policy, because it did not involve the parents. ARM 10.55.701.part (m) (v) [sic] parents as full partners in the decisions that affect children and families."

Montana law provides that the board of trustees of a school district is the entity granted the authority to determine if a student should be expelled from public school. The statute also directs the trustees to "[define] the circumstances and procedures by which the trustees may expel a pupil." § 20-5-202(1), MCA.

The Board of Public Education (BPE) administrative rule, ARM 10.55.701, further defines duties of boards of trustees, requiring trustees to adopt a variety of policies, including:

(3)Each school district shall have in writing and available to the staff and public:

(f) a policy on student, parent, and school employee due process rights;

(n) a parent involvement policy that encourages:

(i) regular, two-way and meaningful communication between home and school;

(i) promotion and support of parenting skills;

(ii) that parents play an integral role in assisting student learning;

(iv) that parents are welcome in the school, and that their support and assistance are sought;

(v) parents as full partners in the decisions that affect children and families; and

(vi) community resources be used to strengthen schools, families, and student learning;

* * *

ARM 10.55.701(1)(n).

The District's policy 3055 establishes a student's due process rights in the event of a recommendation for expulsion, specifically requiring notice to the parents and their right to attend the hearing and present their case on behalf of their child. As noted by the county superintendent's Decision and Order, District policy 3055 cites ARM 10.55.701 as a reference.

The county superintendent apparently interpreted the BPE's requirement for trustees to adopt policies to encourage parent involvement as "full partners in the decisions that affect children and families" to mean K.W.'s parents should have full involvement in expulsion decisions. However, this requirement is not relevant to due process rights and decisions by the Board related to student discipline.

K.W. and his parents had due process rights afforded to them through the procedures followed by the Board. They received adequate notice of the allegations, hearing date and procedures. They attended the hearing and were able to present evidence and testimony before the Board. However, the actual decision to expel a student "is a disciplinary action available only to the trustees." § 20-5-202(1), MCA. The legislature clearly intended the Board to be the only entity that could make a decision to expel a student. The county superintendent's interpretation and application of ARM 10.55.701(3)(n)(v) conflicts with the statutory provision which gives only a board of trustees the authority make decisions regarding student expulsion.

Given the misapplication of the rule, the finding by the county superintendent that the Board did not follow district policy by violating ARM 10.55.701(1)(n)(v), was clearly erroneous.

B. Did the county superintendent err in concluding the Board failed to provide an appeal process to the parent after the decision to expel K.W.?

The county superintendent found "the Board did not provide an appeal process to the

parent after the decision to expel the student." However, the hearing before the Board at which they decided to expel K.W. was closed. As such, there is no record or transcript of that hearing. No witnesses testified at the hearing before the county superintendent regarding this matter. Therefore, there is no evidence whether the Board did or did not advise K.W. of his right to appeal their decision to the County superintendent. The District argues that K.W. has no legal right to notice of his right to appeal the board's decision. Regardless of the arguments supporting the positions of the parties on this issue, the fact that K.W.'s parent timely filed an appeal of the Board's decision renders this issue moot.

C. Did the county superintendent err in concluding a delegation of "the authority to expel student was given by the Superintendent" was relevant to the issue of due process?

The county superintendent stated there was "no written evidence that delegation of authority to expel student was given by the [District] Superintendent..." However, the district superintendent could not delegate authority to expel K.W. because the district superintendent does not have that authority. As stated above, only the Board has legal authority to expel a student. The legislature directed the Board to adopt policies and procedures for suspension and expulsion of students. The Board adopted Policy 3050 which provides "the primary responsibility for student discipline within the school rests with the Principal." Pursuant to Board policy, Principal Richards has the authority to recommend expulsion of a student.

This finding of fact misapprehends the applicable law and district policies, and is clearly erroneous.

D. Did the county superintendent err in concluding the Board violated its own policy in expelling K.W.?

The county superintendent stated that he agreed "that board policy was not followed resulting in a denial of due process with a loss of public education."

The county superintendent did not clarify what part of board policy was not followed. Consideration of the other findings by the county superintendent, in conjunction with a review of the complete record, indicates there was discussion, concern and confusion related to K.W.'s suspension versus expulsion and applicable policies. Although not relevant to the matter

currently before the Superintendent of Public Instruction, the record does show that the principal suspended K.W. after interviewing the students involved in smoking marijuana on school grounds. On March 3, 2011, the same day as the alleged event and investigation into the matter, the principal sent a letter to K.W.'s parents explaining to them he would be recommending to the Board that K.W. be expelled from school for violation of specifically identified district policies, the Student Code of Conduct and the Student Handbook with copies of the relevant portions of each document cited. The letter informed K.W.'s parents that the Board would hear the matter on March 9, 2011, providing details of the procedure and their due process rights.

The letter did not address K.W.'s suspension even though the Student Handbook states a student's parents will get written notice of the student's suspension with a "right to review the suspension." The Student Handbook goes on to provide that:

Upon request of the parents, the [District] Superintendent shall convene a meeting to review the suspension. At the meeting, the student's parents may appear and discuss the suspension with the Superintendent. The Superintendent shall decide whether the suspension is appropriate. The decision of the Superintendent is final and may not be appealed to the Board.

While it does not alter the decision in this matter, it is noted that the principal and district superintendent did not specifically follow this policy. It is also noted that strict compliance with this policy would have been procedurally appropriate, but practically irrelevant. Testimony by the district superintendent at the hearing before the county superintendent indicates that she supported the principal's recommendation for expulsion. Written notice to the parents and review of the seven day suspension by the district superintendent would not have altered the outcome of this matter.

In reviewing the procedure followed for the expulsion of K.W., the record shows substantial evidence the District followed its policies and K.W. received due process. As allowed by District policy 3050 and § 20-5-202, MCA, K.W. was suspended by the principal for violation of the school's policies and student code of conduct. K.W. was advised of the charges and his parents were notified in person and in writing on the day of the occurrence. In fact, K.W.'s mother was physically present during at least some of the investigative interviews with K.W.

The District provided the parents with a letter notifying them that their son was being recommended for expulsion by the Board. They were advised when the hearing would take

place and their rights in connection with the hearing, including the right to bring an attorney to the hearing. The hearing was held, K.W. and his parents were present, and they had the opportunity to present witnesses and testimony. The requirements for due process were met. The county superintendent's conclusion of law and ruling in this regard are in error.

E. Did the county superintendent err in concluding that the motion to expel K.W. was insufficient because it “only contained board policy with no reference numbers and made no mention of the student handbook?”

As noted above, there is no transcript from the closed meeting of the Board when it decided to expel K.W. K. Meetings of a public agency, such as a public school board of trustees, may only be closed when the discussion relates to a matter of individual privacy. § 2-3-203, MCA. K.W. could have waived his right of privacy, but apparently did not.

The minutes of the Board from its meeting on March 9, 2011, simply state that at 7:03 p.m. the expulsion hearing was closed due to privacy of K.W. The open meeting of the Board reconvened at 8:15 p.m. A motion was then made to expel K.W. in accordance with school policy. The motion was seconded and passed unanimously.

Although not raised by K.W. at the lower hearing, the county superintendent made a finding on the issue of the Board's Motion to expel K.W. Although there is no record of the closed session of the Board at which the expulsion hearing was held, the record shows K.W. and his parents received adequate notice of the charges against him, the policies allegedly violated, and were provided an opportunity to challenge the allegations and present evidence in support of a lesser level of discipline. As such, he was afforded due process as required by law.

The county superintendent misapplied the factual evidence resulting in a clearly erroneous finding and leading to an unsupported conclusion.

F. Whether the county superintendent erred in concluding “Progressive discipline could have been used according to policy.”

The county superintendent concluded that progressive discipline could have been imposed and implies that failure of the Board to invoke less severe punishment demonstrates the Board failed to recognize “the gravity of the consequences on a young life and the lives of the student's parents.” County Superintendent Pace further stated, “Where the future of minor

children is involved, it is imperative that parents have identical information to that of the School Board and its District Administrators.” In support of these statements, the county superintendent relied on a decision of a prior State Superintendent, *Bigfork Public Schools v. Meyer, et. al.*, OSPI 259-95 (1998). The case at issue is easily distinguished from *Meyer*. In *Meyer*, in support of expulsion of several students, the school board relied on a policy that had not been adopted at the time of the incident. That is not the situation in this instance. There is no allegation that the policies relied upon by the Board in reaching their decision were not the current policies of the District, or that the policies were not made available to K.W., parents, administrators and Board.

With respect to progressive discipline, the school's Policy 3050 provides that expulsion is a level of discipline which could result from violation of the Student Code of Conduct, and specifically includes “using, possessing, distributing, purchasing, or selling illegal drugs or controlled substances” as inappropriate behavior. The Student Handbook states that the discipline for distributing drugs on school premises is a recommendation for expulsion. The letter to K.W.'s parents stated that the administration had determined K.W. had brought marijuana and drug paraphernalia to school and supplied the drug to other students.

At the hearing before the county superintendent, K.W.'s parent raised the question of whether the parents had actually received the 2010-2011 Student Handbook. Testimony by the principal confirmed, however, that K.W. himself had received the Student Handbook at student orientation.

The *Meyer* case provided guidance which is instructive here. The decision outlined the minimum due process procedures that must be given a student before expulsion: (1) a clear, accurate written notice of what school policy was violated; (2) notice of what evidence of the violation exists; (3) notice of what procedure the school district intends to follow in conduction the hearing; and (4) sufficient time to meaningfully prepare for the hearing. *Meyer*, page 9.

The letter sent by the principal to K.W.'s parents contained: (1) a statement that K.W.'s conduct was a "violation of the Student Code of Conduct and of Policy 3050 as well as Student Handbook pg 14..."; (2) a statement that the administration had investigated the incident and the conclusion reached by the administration; (3) the procedure for the hearing; and (4) six days prior notice to prepare for the hearing or ask for a later hearing date. There are no allegations K.W. did not have time to adequately prepare for the hearing.

While there is no record of what Board members discussed or thought when they decided expulsion of K.W. was appropriate, it is outside of the authority of the county superintendent or the Superintendent of Public Instruction to second guess the Board's decision when there is ample evidence that K.W. and his parents were afforded due process

Principal Richards acted within his authority under the policies adopted by the Board when he recommended that K.W. be expelled. The Board acted within its authority under the policies adopted by the Board and § 20-5-202, MCA when it made the determination to expel K.W. following a hearing. The Board could have determined that K.W. hadn't distributed marijuana and opted for a lesser discipline. However, after hearing all of the evidence presented at the hearing the Board determined K.W.'s violations of school policy was sufficient to expel him.

As discussed above, the record does not support the facts as stated by the county superintendent and such findings are clearly erroneous in view of the reliable probative and substantial evidence on the whole record.

G. Did the county superintendent err in concluding ARM 10.55.701 provides basis for jurisdiction over this matter?

The legislature conferred upon the county superintendent the following duties in connection with hearing school board controversy appeals:

(1)*** [T]he county superintendent shall hear and decide all matters of controversy arising in the county as a result of a decision of the trustees of a district in the county.
* * *

(3) The county superintendent shall hear the appeal and take testimony in order to determine the facts related to the controversy and may administer oaths to the witnesses that testify at the hearing. The county superintendent shall prepare a written transcript of the hearing proceedings. The decision on the matter of controversy that is made by the county superintendent must be based upon the facts established at the hearing.
* * *

§ 20-3-210, MCA. The administrative rules define school controversy, clarifying:

10.6.102 SCHOOL CONTROVERSY MEANS CONTESTED CASE (1) Contested case means 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.

Pursuant to these applicable statutes and rules, jurisdiction was appropriately before the county superintendent. ARM 10.55.701, however, is not applicable to jurisdiction. It is a

regulatory rule related to school accreditation and does not provide for a right to hearing.

The county superintendent had jurisdiction to hear this matter, but such jurisdiction did not arise from ARM 10.55.701.

SUMMARY AND ORDER

This decision of the Superintendent of Public Instruction does not necessarily reflect agreement with the decision of the board of trustees. When trustees follow their adopted policies and procedures to reach a decision that a student should be expelled pursuant to those policies and procedures, it is hoped they reflect on the impact to the student and the ability of the student to continue his or her education. To that end, regardless of whether a student is expelled from school buildings and grounds, the school trustees should consider referring the student for enrollment in the Montana digital academy for continuation of their course work or credit recovery.

The Decision and Order of the county superintendent dated June 14, 2011, contained findings which were in excess of statutory authority; affected by error of law; characterized by abuse of discretion; and clearly erroneous in view of the reliable probative and substantial evidence on the whole record. The county superintendent's Ruling is reversed in part and affirmed in part. Since K.W. was expelled for the remainder of the 2010-2011 school year and the time he was excluded from school has run, the county superintendent's ruling that K.W. "be given the opportunity to attend public school" for the 2011-2012 school year is affirmed. The order to expunge K.W.'s record of any reference to having been expelled is reversed.

DATED this 31st day of October, 2011.

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

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 31st day of October, 2011, I caused a true and exact copy of the foregoing Decision be mailed, postage prepaid, to the following:

**Elizabeth A. Kaleva, Esq.
Megan D. Morris
KALEVA LAW OFFICES
PO Box 9312
Missoula, MT 59807-9312**

**Dawn Welch
6 Alaska Way
Whitehall, MT 59759**

**Garry A. Pace
Jefferson County Superintendent of Schools
PO Box H
Boulder, MT 59632**

/s/ Beverly Marlow
Beverly Marlow
Paralegal