BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

SCHOOL DISTRICT #9, LEWIS AND CLARK COUNTY, MONTANA, Appellant,	)	
-vs-	)	OSPI 38-83
MR. *AND* MRS. WILLIAM WIEDBUSCH, Respondent.	)	DECISION AND ORDER

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This is the second appeal growing out of a controversy in Lewis and Clark County involving the Respondent Parents and the Appellant Resident School District. The controversy revolves about the minor child of the Respondent Parents (T.W.). My first decision and order in this matter was issued September 3, 1982. ***See*** Mr. & Mrs. William Weidbusch v. School District #9, Lewis & Clark County, OSPI 25-82. The Lewis and Clark County Superintendent dismissed the matter without a hearing. I found that order to be contrary to State and Federal special education law and reversed his decision. I directed that an evidentiary hearing be held on the following issues:

1. Whether the parents were afforded due process including notice of their rights, their right to request a hearing within the residential school district if they objected to the placement of the child, being informed of those rights, either actually or by written sign off. Procedural due process in special education laws includes noticing requirements of the school district to the parent and other rights outlined in the special education laws. See OCR comp1aint finding Juniata, Pennsylvania County School District, Feb. 18, 1983, 257:337 CRR Law Reporter.

2. Whether the parents had exhausted all of their .avenues of relief within the district and other considerations, before the decision to unilaterally remove the child.

3. Whether the parents of the child followed the appropriate and explicit directions of federal and

state administrative rules in securing the due process rights for their child.

4. Whether a proper request for a child study team evaluation was made prior to the extraordinary step of unilateral placement.

5. Whether a due process hearing was requested and denied before the parents independently and unilaterally withdrew their child from the residential school district.

6. Whether the parents were involved in the educational determination process of their child in the residential school, were they informed of their rights prior to the individual education plan meetings and whether they participated in and understood the child study team meetings. Appellants must show that they did not fail to pursue legal procedure as guaranteed to them in the Administrative Rules of Montana or under federal law prior to their action of independent withdrawal and placement of their son in another school district.

Following that order, Missoula County Superintendent of Schools Mike Bowman assumed jurisdiction in the case and held hearings October 26, 27 and November 5, 1982. Lewis and Clark County Superintendent was disqualified to proceed on this case. County Superintendent Bowman issued his final Findings of Fact, Conclusions of Law and Order on December 22, 1982, with an Amendment dated January 18, 1983. Both the Appellant School District and Respondent Parents have appealed that decision.

Each side's appeal contends that the other is completely responsible for tuition costs of T.W. The parties have exhaustively and voluminously briefed the issues presented by the first decision in an effort to succeed with their arguments concerning the financial responsibility of the opposing party. I will follow the analysis set forth in my earlier opinion, see Mr. & Mrs. William Weidbusch v. School District #9, Lewis & Clark County, OSPI 25-82, as well as the standard of review which I have adopted in 10.6.125 ARM and which is also found in Section 2-4-704 MCA. I will not reweigh the evidence weighted by the County Superintendent unless such evidence was arbitrary and capricious, or constitutes an abuse of discretion based upon the record.

Following review of the record of over 570 pages, I must concur with the findings of fact arrived at by County Superintendent Bowman. They are as follows:

I.

T.W. is the son of the Petitioners, and at all pertinent times was an elementary school age child living with Petitioners within Respondent School District No. 9, Lewis and Clark County, Montana.

II.

T.W. attended the first grade during the 1973-74 school year.

111.

T.W. was retained in the first grade and successfully completed it in the 1974-75 school year.

IV.

During the 1975-76 school year, T.W.'s second grade year, T.W. was referred to the special education program, to which the Petitioners consented in writing. An evaluation was done by Mr. Benish and Mr. Van Valkenburg, and based on the results of the evaluation and with the approval of the CST (child study team), T.W. was not enrolled in the special education program. T.W. was enrolled in a remedial reading program for the remainder of the second grade, and Petitioners agreed to this placement.

V.

T.W. was placed in a class with a low student-to-teacher ratio for the third grade of the 1976-77 school year. Petitioners consented to this placement.

VI.

On March 1, 1977, T.W. was referred to Lois Moore for a CST evaluation, which was conducted on March 16, 1977. An Individual Education Plan was adopted by the CST, and it was carried out with the consent of the Petitioners. The check-off list used by Lois Moore to document what procedures and processes had occurred with respect to T.W. *is* not conclusive, standing by itself, as to whether or not Petitioners were denied due process, because Lois Moore was not present to testify on the matter.

VII.

As called for in the March CST meeting, a follow-up CST evaluation was held in May, 1977, and an Individual Education Plan was prepared for T.W.'s fourth grade in the 1977-78 school year. Petitioners were present and consented to the plan.

VIII.

T.W. was enrolled in a regular classroom, not a resource room, for the fourth grade during the 1977-78 school year.

IX.

On January 16, 1978, Dr. Moore, the family pediatrician of Petitioners, wrote to Robert Runkel, a school psychologist at the Special Education Co-operative, requesting a follow-up examination of T.W. There is no evidence of any follow-up on the part of Mr. Runkel to that request.

X.

In T.W.'s fifth grade during the 1978-79 school year, Petitioners, T.W.'s teachers and principals held a meeting, and T.W. was enrolled in a Title I reading program.

Xl.

T.W. was enrolled in a Title I reading class in the sixth grade for the 1979-80 school year.

XII.

In T.W.'s seventh grade in the 1980-81 school year, his teacher, Judy Maynard, recommended that T.W. be placed in a remedial reading program which was refused by Petitioners. Petitioners asked that T.W. be given his assignments one week in advance and this request was refused by Glenda Buckley, who taught the special reading class. T.W. was then placed in a special spelling program, to which Petitioners consented, and in which T.W. participated until his removal from school.

XIII.

On January 5, 1981, Petitioners removed T.W. from the school and enrolled him in District #1, the Helena Junior High School, without the recommendation of District #9, the resident district.

XIV.

On January 29, 1981, Petitioners wrote a letter to Ethel Scheet, Chairman of the Board of Trustees of District #9, informing her of their reasons for withdrawal, coupled with a demand that the district pay T.W.'s tuition. This request was denied by the Board at the next regularly scheduled meeting.

XV.

Petitioners instituted a complaint and sent it to Dal Curry of the Office of Public Instruction, alleging failure to provide a free and appropriate education for T.W. Mr. Curry submitted a Report of Preliminary Finding in response to the complaint.

XVI

On November 10, 1981, Mr. Weidbusch orally requested the East Helena School District #9 to convene a CST. The request was denied by the Board of Trustees.

XVII.

On November 16, 1981, Mr. James Reynolds, attorney for the Petitioners, contacted Ethel Scheet and requested a hearing before the Board on the question of payment of tuition. The request was denied by Ethel Scheet on December 9, 1981.

XVIII.

Petitioners appealed the Board's decision, which denied the request for a hearing, to the County Superintendent of Schools, Richard W. Trerise, on December 28, 1981. The County Superintendent issued a decision on June 14, 1982, dismissing the appeal and denying a hearing. Petitioners appealed that decision to the Office of Public Instruction, which reversed the Superintendent's decision and remanded the case back on September 3, 1982. He issued an Assumption of Jurisdiction and appointed Mike Bowman, Missoula County Superintendent of Schools on September 29, 1982 to continue the case. A pre-hearing conference was held on October 25, 1982, and a hearing commenced on October 26, 1982, continued on October 27, was recessed until November 5, 1982, and concluded on that date.

Under my established standard of review and as set forth in Yanzick v. School District No. 23, ____ Mont. , 641 P.2d 431 (1982), I will next address the con-

clusions of law arrived at by County Superintendent Bowman. I will not reverse those conclusions or modify them unless there is a mistake of law, a violation of constitutional or statutory provisions, or other error of law such as not being supported by findings, or for any of the other reasons set forth in Section 2-4-704 M.C.A. Those conclusions of law were as follows:

I.

Petitioners were actively involved in the educational determination process of T.W. in the respondent school district and have not proved the denial of their due process rights prior to January 5, 1981, at which time they unilaterally withdrew T.W. from respondent school district.

II.

The evidence presented is inconclusive as to whether or not an appropriate public education was provided for T.W. prior to January 5, 1981.

111.

Petitioners were denied their due process rights by their resident school district on November 10, 1981, at which time the board denied petitioner's request that a child study team be convened to evaluate T.W.

Conclusion I deals with the primary concern which I ordered these additional hearings to consider. From his findings, the conclusion reached by the County Superintendent was that the due process rights were afforded to the parents in this case, and I find no basis on which to reverse that conclusion. To be sure, there is a dispute in the evidence and the facts claimed by the parties. That is most often the case in a contested hearing, but the hearing officer here, County Superintendent Bowman, viewed both the documentary and the testimonial evidence first hand and reached his conclusion.

Conclusion II in part, flows from the findings and Conclusion I and is worthy of discussion. On its face it is a bit vague and addresses the issue of an appropriate

"public education." As I stated in my first order, the concept of due process and fairness seems also to be integral in the determination of an appropriate public education. The findings entered by the County Superintendent and conclusion indicates that the school district met the obligation of fairness and due process with regard to the minor child here. Both sides discussed Board of Education v. Rowley, U.S. ____ 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). A review of the record does indicate that the minor child did experience continued and significant difficulty during his schooling at School District #9. By the same token, the record reveals constant and significant efforts on the part of the school district to address those issues. Again, it appears to be a factual dispute which is most properly evaluated by the hearing officer. I find no error of law or other abuse in the County Superintendent's determination in Conclusion II and hereby clarify Conclusion 11, to provide that the school district did provide the minor child with a free and appropriate education prior to January 5, 1981.

Finally, we come to conclusion III which does find a denial of "due process rights" on December 10, 1981 because the school district failed to hold a hearing or convene a child study team. The thrust of the conclusion is to impose financial responsibility on the school district for the period subsequent to November 10, 1981. County Superintendent Bowman's findings indicate a unilateral removal of the child prior to exhaustion of all avenues of relief within the district (see my issues 2 through 5, pages 6 and 7, September 3, 1981 decision). The County Superintendent did not make a finding of bad faith on the part of the school district nor did he find that the child's well-being was jeopardized by continued enrollment in the school. Further, the record indicates that the parents had no intention of returning the child to the East Helena School District for education at the time they made the request for the child study meeting. Indeed the child study team had already been convened in Helena at

the time of the unilateral withdrawal of the student, and the parents expressed their complete satisfaction with the program proceeding in Helena. The only reason apparently was a request for retroactive reimbursement.

Both parties in their briefs have discussed the grounds for the application of the doctrice of retroactive reimbursement. As in many other areas of the law, that issue has evolved and I believe the parties have accurately addressed the fundamental issues concerned.

First, did the school district act in bad faith with regard to the education needs of the minor child prior to his unilateral removal on January 5, 19817 The answer from the County Superintendent's reading of the evidence presented clearly was no.

Second, was the well-being of the child threatened in the school district at the time of the unilateral withdrawal on January 5, 1981. County Superintendent Bowman did not make a finding on this issue, but the record does not reveal any threat to the well-being of the child that precipitated the action of the parents - only the frustration of the parents with the system.

Further, the County Superintendent indicated in his Amended Findings, Conclusions and Order that it was his opinion that each school district must continue to provide a free and approriate education for children even when parents unilaterally withdraw the student from school and do not reenroll or seek to readmit the child. I disagree.

The record indicates that the parents had unilaterally withdrawn their child from the Respondent School District. The County Superintendent was correct in his statements that a residential school district must provide a free and appropriate public education to all students. I would agree that such responsibility also extends to students who have been removed from the residential district and whose intent is to return and readmit their child in the residential school district. The intent must be expressed so that it is clear that the residential

district will anticipate the return of the child after the withdrawal and that such return is a commitment upon the parents to attend such school. Unilateral removal with no intention of returning or placing the child back into the residential school district, places no responsibility on the residential district to convene a child study team. In this instance, it is especially noteworthy that a child study team was already functioning in the Helena school system for this child. With the existence of such child study team it would unnecessarily complicate the task to establish and convene yet another child study team by the East Helena School District. The law does not require an idle act.

I agree with the school district's contention that the enrollment of the child in the school district is one necessity for a child study team to be convened. If a student at a private school in the resident district were presented for a child study team evaluation and program, the school district would have had an obligation under our rules to provide that service. However, in this instance, the parents found that Helena school system provided adequate services and needs for their particular child. It appears from the record that there was no intent to return the child to the residential school district. I believe a resident school district would have the obligation to convene the child study team if the child were a resident of the district and did not already have a child study team functioning for him.

That is not the case here. Again, the child was unilaterally removed without evidence of bad faith or threat to well-being. The parents testified that they would not have returned the child to the school, and there is nothing in their request to the school to indicate that the child would be enrolled in the East Helena District. It would seem that to convene a second child study team with possible complications and obvious duplications is not the intent of either state or federal regulation in

this area. While the situation did not evolve in this case, it would be possible to have two different recommendations and avenues of appeal from each of those determinations by each of the two school districts further complicating rather than resolving the educational needs of this child. Indeed it appears from the record that the request for a CST was only to absolve the parents of financial responsibility and not to seek the actual input of a CST.

I therefore hold that in this case where there was a unilateral withdrawal of a child without a finding of bad faith or threat to well-being with a subsequent request to the resident district for a CST after a CST was already functioning in the child's out-of-district placement and where the parents did not indicate that the child would be enrolled in the resident district--there is no obligation to convene a child study team. No obligation for retroactive reimbursement arises nor does an obligation to provide tuition from that point forward arise.

As the record demonstrates in this case, significant disputes as to actual allegations are present. As I addressed in my first opinion where such complex issues are presented, it is imperative for a full hearing to occur. The parents as well as the district must have their day in court. A complete record was established for review.

The parties conducted this matter in the hearing with professionalism, and I compliment them and County Superintendent Bowman for their handling of this case.

Based on the foregoing opinion the decision of the County Superintendent acting for the County Superintendent of Schools of Lewis and Clark County is affirmed in part and modified and reversed in part in accordance with this decision.

Dated this 9th day of September, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

SCHOOL DISTRICT NO. 84, FERGUS COUNTY, MONTANA,
Appellant

-vs-

THOMAS BRINEY,
Respondent.

OSPI 30-82

DECISION AND ORDER

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This is an appeal from School District No. 84, Fergus County, Montana, Appellant herein, appealing the decision of Fergus County Superintendent of Schools dated August 19, 1982. The County Superintendent reversed an earlier decision of the Board of Trustees of School District #84 and ordered that Thomas Briney, Respondent, be rehired by the school district or, in the alternative, receive "appropriate remuneration for the loss of his contract." Both parties are represented by counsel in this matter. Appellants have submitted written briefs. Respondent has not submitted written briefs on this matter. Oral argument was conducted by this Hearing Officer.

The State Superintendent of Public Instruction, pursuant to the Uniform Rules of Controversy, has disqualified himself from this case and has appointed this Hearing Officer to serve in his capacity. Both parties have stipulated on the acceptance of this Hearing Officer.

From the record, the following facts are found. Respondent has been employed by the Appellant School District #84, Fergus County, Montana for 14 years, as a half-time guidance counselor. He is a tenured teacher with that school district. Respondent is endorsed as a guidance counselor and is also endorsed to teach commercial and business subjects.

For several years Denton School District #84 and Geraldine School District have agreed to employ Respondent by dividing his time between schools. The Appellant School