BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
NANCY KEENAN

* * * * * * * * * * * *

8 Ed Law 75 (1989)

HARLEM SCHOOL DISTRICT #12 Appellant,	
vs.	OSPI 164-89
WALLACE and LORETTA BECK. EDWIN and KATHY ZELLMER, MARK and YVONNE RASMUSSEN, EUGENE and SANDY BECK, Respondents.	DECISION AND ORDER

* * * * * * * * * * * *

STATEMENT OF THE CASE

This matter is an appeal before the Superintendent of Public Instruction from Findings of Fact, Conclusions of Law and Order of the Blaine County Superintendent of Schools dated December 22, 1988, on appeal of the decision of the trustees of Harlem School District #12 denying tuition. A hearing was held September 30, 1988, and a decision rendered ordering District #12 to pay District #43 tuition for the children of Respondents.

The issue before the County Superintendent and before this Superintendent is whether the Respondents were entitled to payment of tuition to the school of attendance, Turner School District, from Appellant Harlem School District. (Pre-hearing Order, page 2.)

It is undisputed that the resident school district for the Respondents is Harlem School District. The children attend Turner School District. Both school districts are located in Blaine County. Respondents requested tuition agreements on May 18, 1988, the agreements were approved by District No. 43 on May 18, 1988, and denied by District No. 12-43 (Appellant) on July 25, 1988. Notice of board action was given to Respondent by the Blaine County Superintendent on August 22, 1988.

On January 19, 1989, an Appeal and Request for Oral Argument and Written Brief was filed with this Superintendent. All briefs having been received, oral argument was set for May 24, 1989. Attorneys representing the parties presented oral arguments at the scheduled time and place. The State Superintendent recorded the oral arguments.

DECISION

The State Superintendent of Public Instruction has jurisdiction of this appeal in accordance with Section 20-3-107, MCA. The standard of review in an appeal of a decision of the County Superintendent is set forth in 10.6.125, A.R.M..

Having reviewed the complete record, read the briefs of the parties and heard oral argument, this State Superintendent now makes the following decision: The Findings of Fact, Conclusions of Law and Order of the Blaine County Superintendent is affirmed. The Findings of Fact of the

Blaine County Superintendent are supported by reliable, probative and substantial evidence on the whole record. The Conclusions of Law are not in violation of constitutional or statutory provisions. The Findings of Fact, Conclusions of Law and Order were not made upon unlawful procedure and are not affected by error of law.

MEMORANDUM OPINION

The statutes pertinent to this decision are 20-5-301, MCA, and 20-5-311, MCA, which state in paria materia:

> 20-5-301(3) In considering the approval of a tuition application, the tuition approval agents prescribed in this section shall approve such application for a resident child when:
>
> ....
>
> (c) the child resides more than 3 miles from any school of his resident elementary district and such district does not provide transportation under the provisions of this title:
>
> 20-5-311(2)(a)(i) The approval agents shall approve a tuition application when a child lives closer to a high school of another district than any high school located within his resident district.. ..
>
> (ii) However, the approval agents are not required to approve a tuition application for a student seeking to

attend a high school outside the resident district if the resident district provides transportation.

These statutes clearly state that if the resident district provides transportation there is no obligation to pay tuition for attendance in another district. Under 20-10-101, MCA, transportation is defined as conveyance by school bus, or individual transportation which may include payment to the parent for transporting the student. The question becomes whether Harlem provided transportation to the Respondent students.

The record shows that at the time of tuition application and at the time of the appeal to the County Superintendent was filed Harlem provided no transportation by bus and indeed had no authorized bus routes. The record also shows that Harlem began running buses by the homes of the Respondents' after the appeal had been filed and after the prehearing conference. No buses had run that route for the previous three years. On September 10, 1988, Harlem also sent letters to Respondents expressing interest in entering into transportation contracts. In addition, the record reflects that Harlem placed an ad in The Harlem **News,** a weekly publication, on May **4,** 1988, indicating that transportation contract forms should be obtained from the district clerk.

Appellant did not provide nor offer transportation for Respondents' children at the time they denied payment of tuition, The facts existing at the time the applications were nade were properly considered by the County Superintendent. The belated attempts to provide transportation did not meet the statutory requirements and are irrelevant to this dispute. The one newspaper advertisement did not constitute tender of a contract as contemplated by statute. 20-10-121, MCA. The sord tender requires a more direct action. The essential characteristics of tender are unconditional offer to perform coupled with manifested ability to carry out the offer and production of the subject matter of "tender". Black's Law Dictionary (5th Edition). The language in the newspaper advertisement placed by Appellant simply provides information as to where "contract forms" may be obtained. It does not tender an offer. (Respondent's Exhibit B)

It is possible that under a particular set of facts the only action available to a school district would be an advertisement. Under the facts of this case, the Appellant had actual notice, on June 2 prior to its own deadline of June 15, of the need for transportation contracts and did not "tender" them. It would have been a simple matter to take affirmative steps to provide transportation to Respondents and subsequently lawfully deny tuition.

The Respondents took those steps which any reasonable persons would have believed necessary to request tuition. There is no equity in penalizing a party who had no control over the processing of the application for its untimely completion. Harlem School District 12 did in effect exercise a pocket veto. It is unreasonable to impose an obligation on Respondents for a timeline whose purpose is to allow a school district to properly budget for necessary expenditures (transportation or tuition). 10.7.105, A.R.M.. Harlem School Board had the applications prior to their June board meeting and chose not to act in a timely manner. It was not until the August 22, 1988, notice of denial of application by the County Superintendent to Respondents that the fundamental due process requirement of notice was met. Klundt v. State ex rel Board of Personnel Appeals, 712 P.2d 776 (Mont. 1986).

DATED this 26 day of June, 1989.

Nancy Keenan

NANCY KEENAN
State Superintendent