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

****

JA and WA, as parents and guardians of CA, a minor Appellants and Respondents, v. PLENTYWOOD SCHOOL DISTRICT NO. 20 Appellant and Respondent.	)	OSPI 307-06 **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

That part of the Acting Sheridan County Superintendent's Findings of Fact, Conclusions of Law and Order sustaining the District's objection to entry of the photographs into evidence is affirmed.

That part of the Acting Sheridan County Superintendent's Findings of Fact, Conclusions of Law and Order determining that the allegations regarding violation of equal protection, freedom of assembly, speech, privacy and association under the Montana and U.S. Constitutions are outside of her jurisdiction is affirmed.

The remaining parts of said Conclusions of Law and Order are hereby vacated and the decision of the Plentywood School District Board of Trustees to exclude CA from co-curricular activities for a period of 180 days is hereby upheld and CA's request that the exclusion be expunged from his record is hereby denied.

PROCEDURAL HISTORY

This is an appeal by JA and WA on behalf of their son, CA and a cross appeal by Plentywood School District #2 (hereinafter the "district") of the Findings of Fact, Conclusions of Law and Order dated May 26, 2006 issued by Shirley Isbell, Acting Sheridan County Superintendent of Schools.

The district issued a decision on January 18, 2006 excluding CA from co-curricular activities for a period of 180 days for violation of the Co-curricular Chemical Use Policy (hereinafter CCUP) and the Dishonesty Clause. CA appealed the District's decision to the Sheridan County Superintendent of Schools. The Acting County Superintendent heard this matter on appeal on May 4, 2006. The Acting County Superintendent issued her Findings of Fact, Conclusions of Law and Order on May 26, 2006, Both parties filed Notices of Appeal from that Order with the State Superintendent of Public Instruction on or about June 27, 2006.

ISSUES ON APPEAL

The issues on appeal are:

1. Are the issues raised on appeal moot?

2. Did the Acting County Superintendent err in failing to conclude that CA's suspension was void and any record of that suspension should be expunged?

3. Did the Acting County Superintendent err in refusing to admit copies of photographs into the record?

4. Did the Acting County Superintendent err in failing to order that the due process violations required voiding the suspensions and expunging all record of them?

5. Did the Acting County Superintendent err in not finding that CA's rights to equal protection and due process under the Montana and U.S. Constitutions were violated?

6. Did the Acting County Superintendent err by failing to address CA's arguments regarding violations of the Montana and U.S. Constitutional freedoms of assembly, speech, privacy and association?

7. Did the Acting County Superintendent err by failing to address the JA and WA's argument that the district violated their substantive due process rights, rights to privacy and rights to parent?

8. Did the Acting County Superintendent err by conditioning vacating the remainder of CA's suspension on whether he and his parents appealed her Order to the State Superintendent?

9. Did the Acting County Superintendent improperly shift the burden of proof to the District and fail to acknowledge the testimony of the District's witnesses?

10. Did the Acting County Superintendent err in determining that the Board of Trustees was required by Montana law to keep minutes during an executive session of the Board of Trustees, in violation of section 2-3-212, MCA?

11. Did the Acting County Superintendent err in determining that an immediate suspension of CA was not consistent with board policy?

12. Did the Acting County Superintendent err in determining that there was no substantial evidence that CA violated the District's CCUP.

13. Did the Acting County Superintendent err in determining that the District committed errors in due process?

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).

FINDINGS OF FACT

1. JA and WA (hereinafter "parents") are the parents of CA who was a senior at Plentywood High School (hereinafter the "district") during the 2005-06 school year.

2. Students at the district's schools, including CA, were given copies of the Student Handbook (Hearing Joint Exhibit 1) at the beginning of the school year. (TR. P. 91, l. 1-6) No evidence was introduced that CA did not receive a copy of the Student Handbook.

2. 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)

3. 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 [Hearing, Joint Exhibit 1], Policy C-1, CCUP)

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

6. CA denied attending the party and stated that he was at a private home that evening with three other Plentywood students. The other three students named by CA were also interviewed and denied being at the party. (TR, p. 127, l. 10 - p. 128, l. 3)

7. Following interviews with other students and allegations that CA and the other three students named as his alibis were at the party, the administration reinterviewed CA and the other three students. CA denied being at the party and maintained that he was with the three students he previously named at a private residence. The students named by CA were interviewed again and admitted that they were in attendance at the party on December 31, 2005. (TR. p. 101, l. 12-16; TR, p. 130, l. 24 - p. 131, l. 3)

8. CA was interviewed a third time and was advised that they knew he was at the party and gave him an opportunity to change his prior statements. CA continued to maintain his denial of being at the party. (TR. p. 130, l. 24 - p. 131, l. 8)

9. On January 6, 2006 district administrators determined that CA was in violation of the CCUP and suspended him from co-curricular activities.

10. On January 11, 2006 CA and his parents were notified by letter (Hearing Joint Exhibit 3; TR. p. 213, l. 13 - p. 214 l. 12) that district administrators had recommended to the Board of Trustees that CA be excluded from co-curricular activities for a period of 180 days for violation of the CCUP and the dishonesty clause. CA and his 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.

11. At the hearing on January 18, 2006, Mr. Bennett, the district superintendent, recommended that CA be excluded from co-curricular activities for 180 days for violation of the CCUP and the dishonesty clause. (TR, p. 50, l. 14 - l. 19)

12. The only two persons testifying at CA's exclusion hearing were Mr. Pedersen and Mr. Henderson. (TR, p. 48, l. 13 - l. 16)

13. CA did not testify or present any evidence on his own behalf. CA's parents did not call any witnesses or present any evidence at the hearing. (TR, p. 94, l. 17 - p. 95, l. 2)

14. CA's parents cross-examined Mr. Pedersen and Mr. Henderson. (TR. p. 94, l. 21 - l. 23)

15. The Board of Trustees voted to exclude CA from co-curricular activities for a period of 180 days commencing January 6, 2006 as is reflected by the minutes of Special Meeting of the Plentywood School Board of Trustees dated January 18, 2006. (Exhibit "B" to Appellate Brief of Appellant, Plentywood School District)

16. JA and WA on behalf of CA appealed the Board's decision to the Sheridan County Superintendent.

17. Shirley Isbell, Acting Sheridan County Superintendent held a hearing on this matter on May 4, 2006 and entered her order on May 26, 2006.

18. Both parties appealed from the Acting County Superintendent's Decision and Order.

CONCLUSIONS OF LAW

Issue 1. Are the issues raised on appeal moot?

The State Superintendent will first address the question of mootness because, "[m]ootness is a threshold issue which must be resolved before addressing the underlying dispute." *Grabow v. Montana High School Association*, 300 Mont. 227, 3 P.3d 650.

The District argues that CA's appeal is now moot due to the fact that CA has now

graduated from high school and cites *Dorsch v. Bozeman School District*, OSPI 300-05 (2005) and *Harper v. Board of Trustees of Shepard School District*, OSPI 298-04 (2005). CA argues that effective relief can be granted by expunging the suspension from his record.

The Superintendent's decision in *Dorsch* is not controlling in this matter because the relief sought by the parties is completely different. *Dorsch* wanted his eligibility reinstated so that he could play basketball, but moved before relief could be granted. In the present appeal CA wants the suspension expunged from his record.

In *Grabow v. Montana High School Association, supra,* the Montana Supreme Court has stated:

> A matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy. A question is moot when the court cannot grant effective relief. If the parties cannot be restored to their original position, the appeal becomes moot."

The Supreme Court has also held:

> "In deciding whether a case is moot, we determine whether this Court can fashion effective relief." *Graveyard Creek Ranch v. Bell,* 327 Mont. 491.
>
> "A moot question is one which existed once but no longer presents an actual controversy." *In Parenting of DD,* 110 P.3d 1055.
>
> "A matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy. *DeMeyer v. Miller,* 18 P.3d 1031.

In this case effective relief can be granted as the suspension continues to exist on CA's record. This matter remains in controversy.

Therefore, the State Superintendent determines that this issue is not moot.

Issue 2. Did the Acting County Superintendent err in failing to conclude that CA's suspension was void and any record of that suspension should be expunged?

The Acting County Superintendent concluded that there was no significant testimony or

other evidence that CA violated policy provisions entered into the evidence.

The district policy which is at issue in this case, is the CCUP which states:

> "It is the position of the Plentywood Public Schools that participation in co-curricular activities is a privilege extended to the students who are willing to make the commitment to adhere to the rules that govern the program. It is the District's belief that participation in organized activities can contribute to the all-round development of young men and women.
>
> "This activities code is to cover all students who participate in or represent Plentywood School in co-curricular activities sponsored by this school district. With this in mind, the following regulations and training rules are set forth by school policy as determined by administration, advisors, and coaches.
>
> "Students participating in co-curricular activities, whether sponsored by the MHSA or not, shall not use, have in possession, sell, or distribute alcohol, tobacco, or illegal drugs or abuse prescription or non-prescription drugs during their co-curricular seasons. Possession is defined as the use of a prohibited substance, having a prohibited substance in personal possession, or knowingly (as defined as a reasonable prudent person would know) being present at a function or gathering at which a prohibited substance is illegally used. These rules are in effect twenty-four (24) hours a day. If a student receives an MIP or is seen using tobacco, alcohol, or illicit drugs, the student will forfeit the privilege of participating in accordance with the activities and student handbook.

Contrary to the Acting County Superintendent's conclusion, the State Superintendent finds that there was significant testimony entered into the record by Mr. Pedersen and Mr. Henderson, that during the course of their investigation they determined that (1) CA had been at a party on December 31, 2005 where drinking was involved and that (2) he lied about being there.

Mr. Pedersen and Mr. Henderson testified that staff members overheard students talking about a New Year's Eve party that had been attended by several students. They interviewed 24 students, including CA, whose names had been given to them by staff members. The students were asked if they had been at the party and if they had been drinking. If they denied being at the party they were asked for their alibi. (TR P. 161) CA was interviewed, denied being at the party and gave the names of three students as his alibis and said that they were all at a private residence. During the course of the investigation several of the students admitted to being at the

party including the three students that CA named as his alibis.

Based on the interviews with the students Mr. Pedersen and Mr. Henderson concluded that several students were in violation of the CCUP, including CA. Because this was CA's second violation of the CCUP during his tenure in high school and the fact that they determined he had been dishonest in denying being at the party, they recommended that he be excluded from co-curricular activities for 180 days.

The State Superintendent finds that CA's argument, that because the 2005-06 version of the policy was adopted that year, CA should only be charged with one violation, is not credible. The testimony showed that similar versions of the CCUP had been in place for several years. The minor in possession ticket that CA received during the previous school year (Hearing Exhibit 1) was considered a first violation under the CCUP in effect at that time and would have been considered a violation under the CCUP in effect during 2005-06. Therefore, there is significant evidence to support the fact that CA's violation of the CCUP during 2005-06 was his second violation.

Therefore, the State Superintendent finds that the Acting County Superintendent's conclusion of law that there was not significant evidence or testimony that CA violated school policy a second time is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

Issue 3. Did the Acting County Superintendent err in refusing to admit copies of photographs into the record?

The Acting Superintendent sustained the District's objection that there was no proper foundation regarding who took the photographs, the chain of custody following when they were taken and subsequently delivered to Superintendent Bennett regarding the admission of three photographs into the record. CA has raised this issue on appeal stating that the Acting County Attorney erred in refusing to admit copies of the photographs into the record. The State Superintendent has reviewed the testimony and has determined that proper foundation was not

laid and that the pictures are not relevant to the present appeal and therefore affirms this portion of the Acting County Superintendent's Order.

Issue 4. Did the Acting County Superintendent err in failing to order that the due process violations required voiding the suspensions and expunging all record of them?

The Acting County Superintendent determined that the District was not in compliance with the "Constitution" in its notice (January 11, 2006 letter) to CA's parents regarding the administration's recommendation of a suspension and their right to appear before the board. The Acting County Superintendent also found that there was evidence to support CA's argument that he was denied due process.

The District's policy states that if a "determination is made that a student has violated this policy, the student and parent or guardian shall be notified of the violation by telephone where possible, and also by mail." There is no evidence in the record as to whether or not CA's parents were notified by phone of CA's suspension from co-curricular activities.

The parties did stipulate that CA's parents received the notification from Board Chair, Terry Angvick dated January 11, 2006 informing them that CA had been determined to be in violation of the CCUP, that the recommended exclusion was for 180 days and that the board had scheduled a hearing for January 18, 2006 to hear the matter. They were further advised that they had the right to attend, that the hearing would be held in executive session, that they had the right to present oral or documentary evidence, that they could question the administration's witnesses, that they had a right to retain counsel and a right to request a reasonable period of time in which to prepare for the hearing.

The reference to Section 1232h USC made by the Acting County Superintendent is in error. This reference is to 20 USC 1232h which is commonly referred to as the Family Educational Rights and Privacy Act or FERPA. This section of FERPA pertains only to the requirements for schools to notify parents of the contents of surveys that they plan to submit to

students to solicit information regarding political affiliations, sexual behaviors, mental issues, religious beliefs and other sensitive topics. It does not have any relevance in the present case.

The Acting County Superintendent states that "a part of due process is an opportunity for the accused to face the accuser" and that this opportunity was not provided to CA. This is not correct. The "accuser" in this instance was the district through their administrators. Mr. Pedersen and Mr. Henderson testified that their investigation showed that CA was in violation of the CCUP, that the alibis he gave to support his denial that he was at the party were false and that in fact the persons named as his alibis admitted to being at the party. Therefore, because of the information they had from students and the fact that CA's alibis were false, they determined that CA was in violation of the CCUP and the dishonesty clause. CA had ample opportunity at the hearing before the Board to deny that he was at the party and to produce evidence to show where he was and with whom. The names of these students were well known to CA as he had supplied them to Mr. Pedersen and Mr. Henderson. Based on the information Mr. Pedersen and Mr. Henderson received from these students and others, they determined that CA was not being truthful.

The District had no obligation to provide CA with the names of any student who may have identified CA as being at the party. The District had a right to maintain the privacy of that information to protect the students from retribution. *Newsome v. Batavia Local School District*, 842 F.2d 920, 925.

The District provided CA with an opportunity to request a postponement of the hearing in order to more adequately prepare for it. However, CA did not request such delay until after the hearing was well underway. The time to request a delay to prepare for a hearing is before the hearing commences, not after it has begun and the district had presented its case.

CA alleges that the Board had already determined that CA was in violation of the CCUP prior to the hearing. The testimony is clear that the determination that CA was in violation of the policy was made by Mr. Pedersen and Mr. Henderson, not the Board. The Board had not met

nor taken any action on this matter on January 6, 2007, the date that CA was suspended by Mr. Pedersen. The letter states that at the hearing the "board will make a determination with respect to the recommendation of exclusion from co-curricular activities." The subject policy states that "only the Board can exclude a high school student from participation in co-curricular activities." Obviously, the Board first has to review the administrator's determination that a violation occurred before they can determine if the recommended punishment is appropriate.

At the hearing, the only information that was given to the Board was that the administrators had followed established policy, had interviewed students and were convinced that CA had violated the CCUP and dishonesty policy. They were provided no other evidence, either oral or documentary, which disputed that information. Therefore, they resolved to "uphold the suspensions and implement exclusion from co-curricular activities as recommended by Superintendent Bennett …" (Minutes of 1/18/06 Special meeting of the Plentywood School Board of Trustees)

The State Superintendent finds that CA did receive adequate due process in that he was notified in advance of the hearing and advised of his rights with respect to the conduct of the hearing. The Acting County Superintendent's findings and conclusions on this issue are affected by error of law and clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

Issue 5. Did the Acting County Superintendent err in not finding that CA's rights to equal protection and due process under the Montana and U.S. Constitutions were violated?

Issue 6. Did the Acting County Superintendent err by failing to address CA's arguments regarding violations of the Montana and U.S. Constitutional freedoms of assembly, speech, privacy and association?

The Acting County Superintendent held that CA's claim of a violation of equal protection under the Montana and United States Constitutions was outside of her jurisdiction. The State Superintendent agrees.

The State Superintendent held in *Ronan School District v. Dupuis*, OSPI 296-03, that county superintendents do not have jurisdiction to rule on issues outside of Title 20, Montana Code Annotated and cited:

"County superintendents also do not have the jurisdiction to rule on all matters of law that somehow may be related to schools. County superintendents have the power to conduct administrative hearings to issue findings of fact and conclusions of law in areas that are within their field of expertise under Title 20. They do not have the jurisdiction to rule on questions of law outside of Title 20. For example, they cannot hear tort claims and they do not hear actions arising out of the Montana Human Rights Act." *Brott v. School District No. 9, Browning Public Schools,* OSPI No. 234-94.

The State Superintendent's holding in *Ronan School District v. Dupuis*, was upheld by the Lake County District Court and the Montana Supreme Court.

This holding also applies to CA's other constitutional claims under Issues 5 and 6. The State Superintendent finds that the Acting County Superintendent was correct in her determination that she did not have jurisdiction to address constitutional claims made by CA and his parents and this portion of the order is affirmed.

Issue 7. Did the Acting County Superintendent err by failing to address CA's parents' arguments that the district violated JA and WA's substantive due process rights, rights to privacy and rights to parent?

No evidence was entered into the record at the hearing to establish that JA and WA's due process rights, rights to privacy and rights to parent were violated. The evidence clearly shows that the parents were given due process with respect to their right to attend the hearing before the school board and to enter oral and documentary evidence into the record. They also had the opportunity to enter evidence into the record at the hearing before the County Superintendent. They did neither.

The transcript further does not reflect testimony with regard to their claim of a violation of their right to privacy or their right to parent, except that of Mr. Bennett when asked by his counsel if he knew what those complaints referred to and he answered that he did not. CA's

attorney followed this questioning with questions regarding the policy requirement that a student found in violation of the CCUP either by actually drinking or by association, complete a district-approved drug awareness program and that the cost of this program would be at the expense of the parents. (Tr. p. 116-121) No where does anyone submit evidence as to how this violates CA's parents' right to privacy or right to parent.

Montana law is clear that "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(3), MCA)

Again, CA and his parents were given another opportunity to establish that CA did not violate the CCUP or the dishonesty clause and that their rights were violated. They did not offer any evidence to support their position.

Issue 8. Did the Acting County Superintendent err by conditioning vacating the remainder of CA's suspension on whether he and his parents appealed her Order to the State Superintendent?

The Acting County Superintendent's order vacated the remainder of CA's exclusion from activities on the contingency that he not appeal the decision to the State Superintendent. If he did appeal, the 180 day exclusion would remain intact.

A person's right to appeal a decision of the County Superintendent is established by statute (20-3-210, MCA) and administrative rule (ARM 10.6.121, et. seq.) This right cannot be bargained away. Either CA is entitled to have the remainder of his penalty vacated or not. The Acting County Superintendent ignores fundamental rights of justice in making an order contingent upon not appealing the issue to a higher authority. This portion of the Order is vacated.

Issue 9. Did the Acting County Superintendent improperly shift the burden of proof to the District and fail to acknowledge the testimony of the District's witnesses?

The law is clear that the county superintendent is to hear the appeal and take testimony to determine the facts and make a decision based upon the facts established at the hearing. 20-3-210, MCA.

The only facts established at the hearing were that students indicated that CA attended a party at which illegal substances were being used in violation of the CCUP, that he denied it and supplied alibis and that the alibis eventually admitted that they were at the party. The district's witnesses also testified that they followed established policy in connection with interviewing the students, suspending the students and submitting their recommendation that CA be excluded from co-curricular activities. Those facts were undisputed by any witness called by CA.

The documents submitted by the parties established that the district had a CCUP and a dishonesty policy. A letter was submitted that established that CA and his parents were notified that he had been determined to be in violation of the CCUP and that the administration was recommending that he be suspended from co-curricular activities for 180 days.

Montana law provides that the "initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence." 26-1-401, MCA.

At the hearing before the school board, testimony was given that CA violated the CCUP and the dishonesty clause and that a 180 day exclusion from co-curricular activities was recommended. This recommendation was upheld by the District at the conclusion of the hearing.

CA appealed this determination and had the burden of proving that the board's decision was in error. The Acting County Superintendent's statement that "no significant testimony or other evidence that Petitioner [CA] violated the handbook was entered into the record…" was incorrect.

CA and the Acting County Superintendent make much of the fact that there was no eye witness testimony at either hearing and that the District did not provide the names of the students

who named CA as being at the party. However, the Acting County Superintendent and the parties went to great lengths to ensure that no student's name was mentioned during the testimony. The Acting County Superintendent apparently felt at that time that it was imperative that those students' right to privacy be protected.

The District has an obligation to protect the privacy rights of their students. In cases such as this, retribution is a real possibility and the district has the right to protect their identity. *Newsome, supra.* CA, however, has no such obligation to protect any student's identity and yet he did not call as witnesses the students he used as alibis when being questioned by Mr. Pedersen and Mr. Henderson. If CA had been correct and he truly was not at the subject party and the three students he named were with CA and therefore not at the party, surely they would have been called to testify on his behalf at the hearings. The names of those students were well known to CA and did not need to be disclosed to CA.

Issue 10. Did the Acting County Superintendent err in determining that the Board of Trustees was required by Montana law to keep minutes during an executive session of the Board of Trustees, in violation of section 2-3-212, MCA?

Montana law requires that "appropriate minutes of all meetings required by 2-3-203 to be open shall be kept…" 2-3-212, MCA. Montana law does not require that minutes be kept of the closed portion of board meetings, only that the actions of the Board must be decided publicly. This was done as is demonstrated by the minutes attached as Exhibit B to the Appellate Brief of Plentywood School District.

Issue 11. Did the Acting County Superintendent err in determining that an immediate suspension of CA was not consistent with board policy?

The Acting County Superintendent further states that CA's "immediate suspension is not provided for by either Section 20-5-201(3), MCA or the District's Student Handbook." Section 20-5-201(3) provides that the trustees may exclude a high school pupil from participating in school activities.

Section 20-5-202(1) provides that "a pupil may be suspended by a teacher, superintendent, or principal. The trustees of the district shall adopt a policy defining the authority and procedure to be used by a teacher, superintendent, or principal in suspending a pupil… ." The district's high school student handbook provides at page 18 under "Second Violation" that a student is to be suspended from co-curricular activities for 90 consecutive school calendar days beginning on the first day that the student is determined to be in violation of the above code;". Mr. Bennett testified that routinely the principal and/or athletic director investigated allegations of violation of the CCUP and that if the violation required a recommendation to the board that the student be excluded from participation in activities for more than 30 days, that he would make that recommendation to the board. (Tr. p. 31, 34, 45, 46, 47) The testimony is clear that Mr. Pedersen and Mr. Henderson determined that CA was in violation of the CCUP on January 6, 2007, the first day of his suspension. Because the recommended penalty included exclusion from activities for 180 days, Mr. Bennett recommended this penalty to the board.

The handbook further provides under the section "Student and Parent/Legal Guardian Due Process" that if the exclusion from participation in co-curricular activities is recommended for a period in excess of 30 days, the parent and student will be notified of the date and time the Board will consider the recommendation. This was accomplished by the letter dated January 11, 2006.

The State Superintendent finds that the Acting County Attorney's determination that the immediate suspension of CA was not consistent with board policy to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

Issue 12. Did the Acting County Superintendent err in determining that there was no substantial evidence that CA violated the District's co-curricular chemical use policy.

See discussion under Issues 2 and 4 above.

Issue 13. Did the Acting County Superintendent err in determining that the District committed errors in due process?

See discussion under Issue 4 above.

DECISION AND ORDER

That part of the Acting Sheridan County Superintendent's Findings of Fact, Conclusions of Law and Order sustaining the District's objection to entry of the photographs into evidence is affirmed.

That part of the Acting Sheridan County Superintendent's Findings of Fact, Conclusions of Law and Order determining that the allegations regarding violation of equal protection, freedom of assembly, speech, privacy and association under the Montana and U.S. Constitutions are outside of her jurisdiction is affirmed.

The remaining parts of said Conclusions of Law and Order are hereby vacated and the decision of the Plentywood School District Board of Trustees to exclude CA from co-curricular activities for a period of 180 days is hereby upheld and C.A.'s request that the exclusion be expunged from his record is hereby denied.

DATED this 18th day of April, 2007.

/s/ Linda McCulloch
Linda McCulloch
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 18th of April, 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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