BEFORE LINDA MCCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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DEANNE RAPP SWECKER on behalf of L.H. and R.H.,	
Appellant,	OSPI 278-99
vs.	**DECISION AND ORDER**
SCHOOL DISTRICT NO 3, BLUE CREEK ELEMENTARY DISTRICT, YELLOWSTONE COUNTY, MONTANA,	
Respondent.	

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PROCEDURAL HISTORY

This is an appeal by Deanne Rapp Swecker (hereinafter "Ms. Swecker"), of an April 8, 1999, decision by Acting Yellowstone County Superintendent Jill Richards. Upon motion by the Blue Creek School District No. 3 (hereinafter "the Blue Creek District"), Acting County Superintendent Richards dismissed twelve of the thirteen claims made by Ms. Swecker in her Notice of Appeal to the Yellowstone County Superintendent dated June 29, 1998. Ms. Swecker is also appealing the Acting County Superintendent's April 8, 1999, Order dismissing all of her claims against Billings School District No. 2 (hereinafter "the Billings District"). See Deanne Rapp Swecker on behalf of L.H. and R.H. v. School District No. 2, Billings, Yellowstone County, Montana, OSPI 279-99. This State Superintendent is issuing two orders on review but

most of the procedural background and facts are relevant to both appeals and will be repeated in both orders.

The notice of appeal to the County Superintendent is dated June 29, 1998, but the record is unclear as to when the notice was filed with the County Superintendent and when, if ever, Ms. Swecker served the Districts. Because motions to dismiss are viewed in the light most favorable to the opposing party, this State Superintendent shall use June 29, 1998, as the date Ms. Swecker filed her appeal with the County Superintendent.

Ms. Swecker disqualified the Yellowstone County Superintendent. The Yellowstone County Superintendent appointed the Gallatin County Superintendent (hereinafter the "Acting County Superintendent") to hear the appeal. By letter dated October 9, 1998, Ms. Swecker's attorney requested that the two appeals be consolidated and the matter set for hearing. The Acting County Superintendent declined to consolidate the two appeals because they stated different claims against different school districts.

On October 28, 1998, the Acting County Superintendent issued an Order stating that the Order would serve as notice of a June 29, 1998, appeal. The October 28, 1998, Order also identified Ms. Swecker's claims one, seven, eight and nine as claims under the Individuals with Disabilities Education Act (hereinafter "IDEA") (20 U.S.C. Sec. 1400 through 1487). IDEA claims are governed by the specific procedural requirements of that Act. Under both state and federal law, IDEA complaints cannot be heard by a county superintendent. See § 20-3-211(4), MCA, and 34 CFR 300.508(a)(2).

The Blue Creek District filed a response to the appeal and a motion to dismiss with a supporting affidavit and brief. Ms. Swecker filed an answer brief and the Blue Creek District filed a reply. On April 8, 1999, the Acting County Superintendent issued a Decision and Partial

Order of Dismissal. The Order granted the District's motion to dismiss for all but one claim. The Acting County Superintendent interpreted claim eleven - "Refusal of district to provide transportation or reimbursement for out-of-district special education student [L.H.] pursuant to letter of denial dated 6/20/98." (Notice of Appeal dated June 29, 1998) - as a state law transportation issue and referred it to the Yellowstone County Transportation Committee.

On May 12, 1999, the Office of Public Instruction (hereinafter "OPI") received a document captioned "Amended Notice of Appeal." Although captioned "amended" it is the only notice of appeal this Office received. Attached to the "Amended Notice" was a certificate of mailing dated May 11, 1999. OPI issued a Notice establishing a briefing schedule. Ms. Swecker's initial brief on appeal was due July 8, 1999, but she chose not to file a brief. Her attorney submitted a "Notice of Filed Brief" stating that:

> Petitioners/Appellants, by and through their co-counsel, Lee Rindal, hereby give notice that their briefs were submitted concurrently with and within their Appeal previously submitted to the Office of Public Instruction and all parties and/or their counsel of record. Petitioners/Appellants incorporate the same by reference herein.

Blue Creek District filed a brief.

This State Superintendent, having reviewed the record below including briefs, affidavits and supporting documents, the "Amended Notice of Appeal" and the brief of Blue Creek District, issues the following Order.

DECISION AND ORDER

The October 28, 1999, Order of the Acting Yellowstone County Superintendent dismissing counts one, seven, eight and nine is AFFIRMED. The portion of the April 8, 1999, Order dismissing counts two, three, four, five, six, ten, twelve and thirteen is AFFIRMED. The portion of the Order concluding there was jurisdiction in the County Transportation Committee

to hear count eleven and referring the claim to that body is REVERSED and the Blue Creek District's motion to dismiss is GRANTED.

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 § 2-4-704, MCA, and adopted by the State Superintendent in ARM 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. See, for example, Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan, 241 Mont. 274, 786 P.2d 1164 (1990) and Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, at 474, 803 P.2d at 603 (1990).

Granting a motion to dismiss based on lack of jurisdiction is a conclusion of law. On review, this State Superintendent uses the standard that motions to dismiss are viewed with disfavor and are considered from the perspective most favorable to the opposing party. Buttrell v. McBride Land and Livestock, 170 Mont. 296, 553 P.2d 407 (1976). Bland v. Libby School District No. 4, OSPI 205-92, 12 Ed.Law 76 (June, 1993).

MEMORANDUM OPINION

Summary of Facts.

As stated above, while the claims against the Blue Creek District and the Billings District are different, the disputes that gave rise to the appeals are related. The Districts' motions to dismiss included affidavits and supporting documents. The facts reiterated here are established as follows:

1) the Acting County Superintendent's dockets;

2) the affidavits of the Billings District Business Manager (Dick Reich - affidavit

found in County Superintendent Docket of [H] v. Billings School District No. 2) and the Blue Creek District Principal (Nancy Nettik - affidavit found in County Superintendent Docket of [H] v. Blue Creek School District No. 3);

3) the FP-14 (Student Attendance Agreement - found in County Superintendent Docket of [H] v. Blue Creek School District No. 3, Reich affidavit, Attachment B) signed by Ms. Swecker;

4) the minutes of the Blue Creek District Trustees May 14, 1998, meeting (Swecker v. School District No. 3, Blue Creek, OSPI 278-99, Respondent Brief, Attachment B); and

5) the procedural record In the Matter of L.H. (OSPI 97-10, mediated September 4, 1997, closed December 4, 1997, an IDEA due process proceeding before the State Superintendent of Public Instruction brought by Ms. Swecker against the Blue Creek District in 1997).

On April 18, 1997, Ms. Swecker withdrew L.H. and R.H. from elementary school in the Blue Creek District (Nettik Affidavit, paragraph 2). Sometime prior to that date a Blue Creek District teacher's aide made a tape recording of R.H. (Nettik Affidavit, paragraph 3, and Notice of Appeal). On April 18, 1997, an employee of the Blue Creek District, acting on her own behalf, obtained a temporary order of protection against Ms. Swecker (Nettik Affidavit, paragraph 4).

L.H., a student eligible for special education services, has certain educational rights and procedural protections in addition to those afforded all Montana students. One of those rights is the right to a due process hearing before an impartial hearing officer on issues related to identification, evaluation, educational placement and the provision of a free appropriate public education (hereinafter "FAPE"). On June 3, 1997, Ms. Swecker filed a request for an IDEA due process hearing regarding L.H.'s educational placement and the provision of FAPE. Although a

Blue Creek District resident, Ms. Swecker wanted L.H. placed in the Billings District.[1]

OPI notified the Blue Creek District and appointed an impartial hearing examiner who, at the request of the parties, acted as mediator (Docket, OSPI 97-10). On September 4, 1997, a mediation conference was held. Ms. Swecker was present along with a number of representatives including her attorney. The Blue Creek District was represented by its principal and its attorney.

The Report of Mediation Conference states that the participants reached tentative agreement regarding L.H.'s enrollment in Blue Creek. Ms. Swecker's attorney agreed to prepare a preliminary draft. No draft is found in the record. However, in October 1997, L.H. was enrolled in the Billings District pursuant to an agreement between the Blue Creek District, the Billings District and Ms. Swecker that the Billings District was the appropriate special education placement.

In accordance with the Billings District's practice regarding out-of-district students eligible for special education services, L.H. was enrolled subject to the agreement that the district-of-residence (Blue Creek District) pay tuition (Reich affidavit, paragraph 3).

According to the Reich affidavit and Ms. Swecker's appeal, sometime in the Fall of 1997 Ms. Swecker purportedly transferred the guardianship of R.H. to Heather Swecker in a proceeding in District Court. As a matter of state law, however, and as stated by their mother on a Form FP-14 (Application for out-of-district attendance, Reich affidavit, Attachment B), L.H. and R.H. are residents of Blue Creek District. They are, therefore, out-of-district students

[1] Section 20-7-421, MCA, provides that if the individualized education program ("IEP") team determines it is appropriate, the trustees may arrange for attendance and related services in another Montana district. Tuition and transportation as required under 20-5-323, MCA, may be charged as provided in 20-7-420, MCA.

enrolled in the Billings District.

On October 27, 1997, the Billings District, acting through its attorney, sent written notice that the District required tuition for out-of-district students enrolled in the District (Reich affidavit, Attachment A). The letter explained that Blue Creek District was responsible for L.H.'s tuition because he was a student eligible for special education services and the Districts agreed his appropriate placement for FAPE was in the Billings District. The letter explained that R.H. could enroll as an out-of-district resident, that the guardianship proceedings did not change R.H.'s legal residence for school purposes and that the parents would be responsible for the tuition. The letter also cited Ms. Swecker's attorney to the procedural statutes governing tuition.

On December 4, 1997, the proceeding In The Matter of L.H. was closed. The Order references the following statement by Ms. Swecker's advocacy group representative:

> As of November 24, 1997 [L.H. and R.H.] are in school at last!! The Billings Public School District through its attorney, Larry Martin, informed Ms. Rapp [Ms. Swecker] that both [L] and [R] could attend Newman School. Newman School is the school that the boys used to attend before they moved into the Blue Creek School District. It is also the school that Ms. Rapp [Ms. Swecker] requested six months ago and was told repeatedly that Newman was too crowded to accept two new second graders. Deanne [Ms. Swecker] is ecstatic about the placement at Newman and the boys are very pleased. Ms. Rapp [Ms. Swecker] will probably pursue an appeal of the tuition charges for [R], but no matter how the appeal plays out, the boys will stay at Newman. At this point, it appears that the due process proceedings can be concluded since [L.H.] is in an appropriate school setting where he can receive the special education to which he is entitled.

Ms. Swecker's advocate stated that the due process proceeding could be closed. Her statements also show that the Billings District had notified Ms. Swecker's advocate of its tuition decision and the appeal process for tuition disputes by at least December 4, 1997.

The Billings District allowed Ms. Swecker to offset a portion of the tuition charge with Heather Swecker's prior year tax bill attributable to elementary mills. On February 5, 1998, the

Billings District sent Ms. Swecker notice of its calculation of this amount (Reich Affidavit, Attachment C).

There is no record of an FP-14 being submitted to the Blue Creek District. However, Nancy Nettik's affidavit states that the district received a request from Ms. Swecker that it pay tuition to the Billings District for R.H. R.H. is not an IDEA-qualified student but Ms. Swecker wanted to enroll him out-of-district. A Blue Creek District Board of Trustees meeting was held on May 14, 1998, and it is a matter of public record that the Trustees denied the tuition request (Respondent Brief, Attachment B).

On June 29, 1998, Ms. Swecker filed her appeal with the County Superintendent.

Issues Raised on Appeal.

Blue Creek District's Procedural Issue. The Blue Creek District argued that this appeal was not timely because it was filed more than 30 days after the Acting County Superintendent's Order. The Acting County Superintendent's Order was dated April 8, 1999. The notice of appeal is dated May 11, 1999, and was received in this Office on May 12, 1999. Allowing three additional days for mailing, the May 11, 1999, appeal is timely.

Petitioner/Appellant's Issues. Ms. Swecker raised nine issues in her "Notice of Amended Appeal" but she never filed a brief. Issues one through five can be paraphrased into the following three issues:

1. Did the Acting County Superintendent err by dismissing the appeal without a hearing?
2. Did the Acting County Superintendent's failure to include attachments with the copy of her Order adversely affect Ms. Swecker's rights?
3. Did the Acting County Superintendent violate LH.'s IDEA procedural or substantive rights?

This State Superintendent cannot address issues six through nine because they are

unintelligible[2]

Issue 1. The Acting County Superintendent Correctly Granted the Motion to Dismiss. The State Superintendent has repeatedly held that a county superintendent should dismiss an appeal without a hearing if he or she does not have the jurisdiction to rule on the appeal. A county superintendent lacks jurisdiction if the appeal is not timely, if the issue raised is not actionable, or if the county superintendent does not have subject matter jurisdiction to hear the matter.

In this case the Acting County Superintendent received a Motion to Dismiss from the Blue Creek District which she correctly ruled on prior to a hearing. She dismissed all counts, making a hearing unnecessary. Her decision to dismiss was based on two theories – (1) the time for filing an appeal had run prior to June 29, 1998, and (2) the Acting County Superintendent lacked subject matter jurisdiction because most of the issues raised on appeal did not involve review of decisions of the Blue Creek District Board of Trustees.

A. Appeal Time Had Run. Under § 20-3-210(1), MCA, a county superintendent has jurisdiction to hear and decide (with some exceptions) "matters of controversy arising in the county as a result of decisions of the trustees of a district in the county." (Emphasis added.) In addition to the requirement that the matter on appeal be a decision of the trustees, the appeal

[2] Ms. Swecker's Issue six is "As to Acting County Superintendent decision on Count Three, Petitioners incorporate their bases of appeal with Issues 4 and 5." Ms. Swecker's Issues seven, eight and nine are the same statement referencing "count four," "count five" and "count six."

must be timely. ARM 10.6.103[3] establishes 30 days after a final action of the Board as the period allowed for appeal. See, for example, Schrumpf vs. Board of Trustees of School District 55H, Roundup, OSPI 275-98 (10/2/98) and Bland vs. Board of Trustees, School District No. 4, Libby, OSPI 205-92 (6/9/93)

With the exception of the tuition issue, the thirteen "claims" raised on appeal to the Acting County Superintendent were not decisions of the Blue Creek District Trustees and therefore were not matters that could be reviewed by a county superintendent. The Acting County Superintendent was correct, however, that the time for filing an appeal of any Blue Creek District Trustees actions had run.

The last day L.H. and R.H. attended school in the Blue Creek District was April 18, 1997. The appeal was filed with the County Superintendent on June 29, 1998 – more than 14 months later. Other than R.H.'s tuition issue, Blue Creek School District Board of Trustees could take no action after April 18, 1997, regarding R.H. or L.H. that could be appealed to the County Superintendent.

The only action the Trustees of the Blue Creek District took in 1998 was to deny a request that the district pay R.H.'s tuition. That action occurred on May 14, 1998, which was still more than 30 days before June 29, 1998. The Trustees' decision was discretionary and governed by § 20-5-320, MCA. There are very few grounds for setting aside a discretionary decision of the Trustees but, in any case, the appeal to the County Superintendent must be made

[3] 10.6.103 INITIATING SCHOOL CONTROVERSY PROCEDURE PROCESS (1) A person who has been aggrieved by a final decision of the board of trustees of a school district in a contested case is entitled to commence an appeal before the county superintendent. (2) A school controversy contested case shall be commenced by filing a notice of appeal with the county superintendent and the parties within 30 days after the final decision of the governing authority of the school district is made. Notice of appeal shall be served by certified mail. Respondent shall file a written reply to the notice of appeal within 10 days of receipt. (Emphasis added.)

within 30 days of the Board's final decision.

B. No Subject Matter Jurisdiction. Because the Acting County Superintendent correctly dismissed the appeals as untimely, there was no need for her to address the merits of Ms. Swecker's appeal. Dismissing an appeal on one basis is sufficient. The District also raised the issue of lack of subject matter jurisdiction, however, and that issue will be addressed briefly in this Order.

Section 20-3-210, MCA, provides for appeals and hearings before the county superintendent on "all matters of controversy arising in the county as a result of decisions of the trustees." This has never been interpreted as a grant of general jurisdiction to a county superintendent to resolve any and all disputes that may arise in school districts. County superintendents are not district court judges. They do not have the jurisdiction, or the expertise, to hear and decide any and all actionable claims.

For example, one claim raised below was that the Blue Creek District Trustees violated § 2-3-203, MCA (the Montana Open Meeting Law). A county superintendent does not have the jurisdiction or expertise to rule on an open meeting question. The claim would have to be raised in District Court. Likewise, Ms. Swecker's claims regarding tape recording and restraining orders are not trustee decisions that are administrative actions reviewable by the County Superintendent.

Nor does every disagreement over trustees' decisions give rise to an actionable claim. To have a hearing before a county superintendent there must be a matter of school controversy -- a statutory or constitutional right to an administrative hearing before the county superintendent. County superintendents do not have the authority to set aside all trustee decisions. Just as there must be a cause of action in District Court, there must be a constitutional interest at stake or a

statutory right to a hearing before the dispute rises to the level of contested case.

For example, the claims regarding the Trustees' failure to adopt policies on employee conduct is not a decision reviewable by the County Superintendent. The matters that a school district must address with written policy are stated in administrative rule as criteria for accreditation. Section 20-7-102, MCA, and ARM 10.55.701. The Board of Public Education, not a county superintendent, has jurisdiction over whether a policy is required for accreditation. If a policy is not required for accreditation, the matter is left to the discretion of the locally elected trustees. A county superintendent could not require trustees to adopt a policy not required by accreditation standards.

As stated in Althea Smith v. Board of Trustees, Judith Basin County School District No. 12, 11 Ed. Law 65 (OSPI 1992) (affirmed on other grounds in Althea Smith v. Board of Trustees, Judith Basin County School District No. 12, Cause No. CDV 92-1331, 12 Ed. Law 24 (1st J.D. 1993)):

> Unless a claimant has a case in controversy (contested case), the administrative process is not invoked and the county superintendent is without jurisdiction to hear the complaint and the complaint must be dismissed.
>
> To find that § 20-3-210, MCA, confers unlimited jurisdiction on a county superintendent leads to absurd results. I cannot believe that the legislature intended to subject every decision of a board of trustees to judicial review. If the county superintendent must hear an appeal on every decision of a board of trustees, this would be the result.

This remains the position of this State Superintendent on the extent of the jurisdiction of state and county superintendents of schools and will be consistently applied.

Issue 2. The Acting County Superintendent's Inadvertent Failure to Include an Attachment Referred to in her Order did not Adversely Affect any Rights of Ms. Swecker. The only attachments referred to were the Administrative Rules of Montana governing appeal to the

State Superintendent. These rules are a matter of public record and readily available.

In any case, Ms. Swecker suffered no harm from her failure to follow the procedural rules. The State Superintendent considered the appeal timely and sent her written notice of the opportunity to file a brief.

Issue 3. The Acting County Superintendent's Order did not Violate L.H.'s IDEA Procedural or Substantive Rights. The Acting County Superintendent correctly found that she was without jurisdiction to hear a special education matter. See § 20-3-211(4), MCA. Ms. Swecker had already taken her special education dispute to the proper forum -- a due process hearing. She had already been afforded mediation and, through her representative, had notified the hearing examiner that she was satisfied with the resolution of the matter. See In the Matter of L.H., OSPI 97-10, December 7, 1997, Order closing the case. The Acting County Superintendent was incorrect, however, when she stated that she could refer the special education issues to the State Superintendent.

Neither a county superintendent nor the State Superintendent has the authority to initiate a due process hearing. The procedural requirements of IDEA are very specific. Before a matter can go to a due process hearing a school district and the parents must participate in Individualized Education Program (IEP) meetings. As detailed in Federal statutes and regulations at 20 U.S.C. 1415(b)(6) and (f) and 34 CFR 300.507 through 514, and state statutes and rules at § 20-7-403(11) and ARM 10.16.3507 through 3523, a parent or a school district, not a county or state superintendent, may then initiate the request for due process (34 CFR 300.507). Section 300.507(a)(1) states:

> (a) General. (1) A parent or a public agency may initiate a hearing on any of the matters described in Sec. 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of

FAPE to the child).

In this case the parent had already raised the issue of L.H.'s educational placement. She had requested and received the opportunity for a due process hearing. The matter had been successfully mediated with the outcome Ms. Swecker wanted -- placement in the Billings School District.

Similarly, the Acting County Superintendent did not have the authority to refer the issue of L.H.'s transportation to the County Transportation Committee. That claim should have been dismissed. If an IDEA-identified student is not an eligible transportee as that term is defined in § 20-10-101(2), MCA, the question of whether transportation should be provided as a related service is an issue that should be addressed in the IEP.

CONCLUSION

The Acting County Superintendent's Orders dismissing claims one through ten and claims twelve and thirteen are AFFIRMED. The Acting County Superintendent's Order concluding there was jurisdiction in the County Transportation Committee to hear count eleven is REVERSED and the District's motion to dismiss is GRANTED.

DATED this 8th day of May, 2001.

/s/ LINDA MCCULLOCH

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Decision and Order to be mailed to:

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