BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
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MR. and MRS. WILLIAM WIEDBUSCH, Appellants	)	DECISION AND ORDER
v.	)	
SCHOOL DISTRICT NO. 9, LEWIS AND CLARK COUNTY, MONTANA Respondent.	)	OSPI 25-82

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This is an appeal from the findings of facts, conclusions of law and order of the Lewis and Clark County Superintendent of Schools. Parties to this appeal have stipulated to the State Superintendent their waiver of the time limitation of 30 days pursuant to Section 121a.512 Code of Federal Regulations.

The findings of facts issued by the County Superintendent were as follows:

1. Mr. and Mrs. William Wiedbusch reside in School District No. 9, East Helena, and are the parents of T.W.
2. T.W. attended school in District No. 9 from September 1972 until January 5, 1981.
3. T.W. was evaluated by Child Study Teams in District No. 9 in second, third, and fifth grades, and was placed in special education programs.
4. T.W. was eligible for Title I instruction during fourth, fifth, and sixth grades, and received Title I instruction during at least fifth and sixth grades.
5. The parents of T.W. independently removed T.W. from School District No. 9 on January 5, 1981, and placed T.W. in the Helena School system.
6. The parents of T.W. did not seek the recommendation and approval of the resident district Board of Trustees prior to removing T.W. from District No. 9.
7. The parents of T.W. have paid tuition costs to the Helena School system for at least a portion of the time T.W. has been enrolled in Helena, at the rate of one hundred dollars ($100.00) per month.

8. The parents of T.W. filed an appeal before the County Superintendent of Schools requesting the East Helena School District No. 9 pay T.W.'s tuition.

9. All parties agreed, pursuant to a Pre-hearing Order, that the County Superintendent could determine, prior to hearing, whether, under any circumstances, School District No. 9 could be compelled to pay the educational costs of T.W., given the fact that the parents of T.W. independently placed T.W. out-of-district.

The County Superintendent of Schools received extensive and exhaustive briefing from both parties prior to the issuance of the findings of facts, conclusions of law and order. The briefs covered a wide range of issues, relating from financial obligations of the residential school districts in out-of-district placement to free and appropriate public education. Through the mass amounts of briefs filed, the parties entered into a pre-hearing order. Four specific agreed upon facts developed out of the pre-hearing order. Those agreed facts are listed as follows:

1. T.W. is the son of petitioners, Mr. & Mrs. William Wiedbusch, and is an elementary school age child who lives with his parents within School District #9, Lewis & Clark County, Montana.

2. T.W. attended elementary schools operated by the respondent from September, 1972 until January 5, 1981, or from kindergarten until the middle of the seventh grade.

3. T.W. was evaluated by a child study team formed by the respondent in 1976 when he was in the second grade.

4. T.W. was independently removed by his parents from the respondent's school system on or about January 5, 1981, and placed by them in the Helena school system.

The remainder of the findings of fact made by the County Superintendent was found without the benefit of an evidentiary hearing.

This State Superintendent has adopted the Standards of Review of the Montana Administrative Procedures Act. These standards state in part:

Section 2-4-704. Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(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) because findings of fact, upon issues essential to the decision, were not made although requested.

Because there had been no evidentiary hearing in this case, the agreed facts as stipulated in the pre-hearing order are the only facts that have been established to date and which would have met the standards of review as outlined by the Montana Administrative Procedures Act. Garsjo v. Department of Labor and Industry, 172 Mont. 182, 562 P.2d 473 (1977).

All other facts found by the County Superintendent in this case have not been agreed upon nor is there a record to allow this State Superintendent to determine whether the findings were erroneous in view of the reliable probative and substantial evidence on the whole record. Simply stated, there was no record; therefore there were no issues resolved. It appears that the County Superintendent was troubled in determining the proper legal issues. Once an issue was determined, he failed to allow a proper evidentiary hearing. Appellants have not had their day in court to explain why they took the extreme steps of withdrawing their son from the residential school.

In uncomplicated and straightforward school controversies such an agreed stipulated statement of facts as used here is useful in resolving school controversies and speeding their resolution. Generally speaking, however, matters involving the special education of children are not so easily simplified. Evidence and testimony on the record

with rights to cross-examine and to submit additional evidence and documentation should be required in order to have the issues fairly presented to the County Superintendent and the reviewing authorities. The fact that the County Superintendent permitted this brief stipulated statement of agreed facts to govern his consideration of the case will result now in increased delay, rehearing, reappeal, and extensive duplication of effort by all of those involved. In the future, as a guide for County Superintendents they would be well to hold full evidentiary hearings on the issues presented in order to avoid such waste.

The underlying issue of this entire case at this point in the controversy has been misdirected by the County Superintendent. Appellants raised the issue of whether a residential school district may be held financially responsible for the tuition of a student who was independently and unilaterally placed by his parents in an out-of-district school.

Briefly, the law on special education develops from a tri-level consideration involving a multitude of other issues in a case of this nature. Each level needs independent consideration and affirmation before a consideration of the next level. These levels include:

1. Were the child and the parents or legal guardians of the special education child afforded procedural due process as outlined in both state and federal law. If the parents, legal guardians and child was denied due process, then
2. Was the child provided free and appropriate public education. Free and appropriate education may be provided even though procedural due process may have been violated. The question of financial responsibility still would not be ripe. Public Law 94-142 explicit purpose is to insure that a special education child receives a free and appropriate public education.
3. Not until a parent or legal guardian or child proves that they were denied procedural due process protections and their statutory right to a free and appropriate public education would an inquiry then be warranted to determine whether a school district may be held financially responsible for the independent actions of the parent in unilateral placements.

Appellants admit that state and federal rules are very clear, parents who independently and unilaterally place their child in a school outside of the residential district relieve the residential district of all financial obligations pursuant to Section 10.16.1310 (1) Administrative Rules of Montana.

> 10.16.1310 Out-of-District Services (1) If school district is unable to provide services for its resident handicapped students or unable to provide services through cooperative services, the school district may have to use out-of-district placement. The decision to place a child out-of-district must be recommended by the resident district child study team and approved by the resident district board of trustees. Placement made independently of the public school by the parents and/or other agencies relieves the public school of all financial obligations.

Further, federal and state case law is clear in terms of the unilateral placement by parents and in not holding school districts financially responsible for these unilateral placements. Ruth Anne M. v. Alvin Independence School Dist., (D.C.Tex.), No. G-80-11, Jan. 18, 1982.

This State Superintendent disagrees with Respondent's contention that Section 10.16.1310 automatically ends all inquiry as to whether parents' unilateral placement relieves a school of financial responsibility.

Prior to a determination of whether a school district may be held financially responsible for the unusual and extraordinary action of a parent unilaterally placing a child in an out-of-district placement, initial inquiry must center on issues such as:

1. Whether the parents were afforded due process including their right of 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 by the school district to the parent and other rights outlined in the special education laws. See OCR complaint finding Juniata, Pennsylvania County School District, Feb. 18, 1982, 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 decisons 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 educational 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.

The parents admit that they have an extraordinary burden of proof in such hearing.

Independent actions by parents without good reason cannot be condoned under the present special education system. Unilateral placement of children within the exclusive discretion of the parents or legal guardians means a complete loss of control of such situations for residential school districts and unpredictable financial consequences.

The County Superintendent must also make findings of fact basing such findings not on legal briefs but more appropriately on the record as established in the administrative hearing and pursuant to specific directions of Montana Administrative Procedures Act.

Recently the Montana Supreme Court in B.M. v. State of Montana, ____ St. Rptr. ____ (1982), ordered that a district court allow parents their day in court to determine the merits of a case similar

to the one presented here. Although the B.M. case was filed prior to the extensive protections afforded to parents and to children under the present special education laws, the case reflects the Supreme Court's concern for the concept of fairness. This concept of the Court must be followed here. As in B.M., Appellants here must recognize that the burden of proof is on them to show the denial of due process.

Therefore, this case is reversed and remanded back to the County Superintendent of Lewis & Clark County with directions as outlined above.

DATED September 3, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

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RALPH FOLLINGLO Petitioner, v. THE BOARD OF TRUSTEES OF CASCADE COUNTY SCHOOL DISTRICT #1 and A Respondent.	)	DECISION AND ORDER OSPI 16-82

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This is an appeal by a tenured teacher, Ralph E. Follinglo, of a reduction in force decision (hereinafter referred to as RIF) made by the Cascade County Superintendent of Schools rendered December 19, 1981.

That decision combined the appeals of Ralph Follinglo and Howard Hahn. However, only the decision affecting Mr. Follinglo has been appealed.

At the outset, I believe it is essential to note that the RIF actions of the respondent school district affected many teachers initially. Fortunately, other circumstances allowed many of the teachers to be rehired and only three teachers appealed the county superintendent's orders with respect to them, to me. Since the time of the submission of these appeals, two of the three have become moot because of parallel and decisive actions taken with regard to the teacher's contract rights. I think both the school district and the teachers of Cascade County as well as the county superintendent, have done an excellent job in managing this complex and difficult area of reducing staff in the face of decreasing enrollments.

While Mr. Follinglo is the sole appellant before me, it is necessary and I believe it was necessary for the county superintendent, to consider all teachers within the appellant's group together in order to determine whether or not the RIF was properly applied. In considering the group, I must look to the three teachers in the social studies area, two of whom would have to have been reduced to meet the original RIF needs. The social studies department needed to reduce six FTE's. That was done as follows: D. L. equals 0.4, M. C. equals 1.0, C. F. equals .6, C. B. equals 1.0, A. H. equals 1.0, *R. F. equals 1.0, and *H. H. equals 1.0.