

VOLUME NO. 35

Opinion No. 42

COUNTY SUPERINTENDENT OF SCHOOLS — Appeal before, original proceeding, de novo consideration; SCHOOLS AND SCHOOL DISTRICTS — Appeal before county superintendent a de novo hearing. Section 75-5811, R.C.M. 1947.

HELD: An appeal before the county superintendent of schools is an original proceeding and de novo consideration of a controversy, and not merely a review of a decision by a school board.

December 10, 1973

Mr. R.W. Heineman
Wibaux County Attorney
P.O. Box 313
Wibaux, Montana 59353

Dear Mr. Heineman:

You have requested my opinion as to whether an appeal before the county superintendent of schools is an original proceeding with de novo consideration or merely a review of the decision of the school board.

Although original decision-making power is vested in the school board of trustees, the legislature has specifically provided for an original hearing proceeding with presentation of witnesses and testimony on appeal before the county superintendent of schools. Section 75-5811, Revised Codes of Montana, 1947, provides in pertinent part:

The county superintendent shall hear and decide all matters of controversy arising in his county as a result of decisions of the trustees of a district in the county. Furthermore, he shall hear and decide all controversies arising under:

(1) section 75-6315 or 75-6316 relating to the approval of tuition applications;

The county superintendent shall hear the appeal and take testimony in order to determine the facts related to the controversy and may administer oaths to the witnesses that testify at the hearing. He shall prepare a written transcript of the hearing proceedings. The decision on the matter of controversy which is made by the county superintendent shall be based upon the facts established at such hearing.

The decision of the county superintendent may be appealed to the superintendent of public instruction and, if it is appealed, the county superintendent shall supply a transcript of the hearing and any other documents entered as testimony at the hearing to the superintendent of public instruction.

The term "hearing" when used with reference to a proceeding is an equity term synonymous with "trial," and includes the reception of evidence and arguments thereon for the sake of deciding correctly thereon. **Grant v. Michaels**, 94 Mont. 452, 461, 23 P.2d 266. Montana law thus has specified a de novo type proceeding upon appeal to the county superintendent, and not merely a review of a decision of a school board. An analogous situation is an appeal from justice court to district court. Although that proceeding is referred to as an appeal, it is a trial de novo and original proceeding. The decision rendered by the school board is not voided by full consideration of the controversy by the county superintendent, but the board's decision is taken into consideration along with facts, documents and testimony presented at the hearing.

THEREFORE, IT IS MY OPINION:

An appeal before the county superintendent of schools is an original proceeding and de novo consideration of a controversy, and not merely a review of the decision of the school board.

Very truly yours,

ROBERT L. WOODAHL
Attorney General