

14DP

**BEFORE THE SPECIAL EDUCATION
DUE PROCESS HEARING OFFICER**

IN THE MATTER OF THE)
DUE PROCESS HEARING FOR)
AND USD # AND)
SPECIAL EDUCATION)
COOPERATIVE.)
_____)

Case: 14 DP

MEMORANDUM DECISION

THIS MATTER comes before the Due Process Hearing Officer on a Motion to Dismiss the due process hearing by the Special Education Cooperative and U.S.D. # (referred hereafter as "District"). The District is represented by Sarah J. Loquist, Attorney at Law. The Parents are represented by , father of and Attorney at Law.

PROCEDURAL AND FACTUAL BACKGROUND

On January 9, 2014, became upset at another student accusing her of taking some of his personal effects. threatened the student and used profanity in the classroom. The following day, January 10, 2014, the parents of were sent a letter stating that would be suspended for five (5) days, beginning January 9 and ending on January 16. The parents were further notified that a long-term suspension or expulsion hearing would be held on January 16, 2014 at 9:00 a.m.

On January 14, 2014, a manifestation determination meeting was held with the IEP team which included the parents. The IEP team determined that's behavior concerning the event on January 9 was a manifestation of his disability. had been identified as Learning Disabled and been diagnosed by Dr. Columbus Bryant with adjustment disorder with mixed anxiety and depressed mood and dysthymic disorder. He was receiving counseling for social-emotional assistance at the school.

On January 16, 2014, the expulsion hearing was held. Despite the manifestation determination, the hearing committee determined that should be expelled for 186 days and noted that due to's status as a special education student, the district had a responsibility to provide him educational services through the Special Education Cooperative in the ACE program.

On January 23, 2014's Parents filed an Appeal of the Expulsion Determination and a Notice of Parent's Request for Expedited Special Education Due Process Hearing. The following day, the District sent a letter notifying the parents that the expulsion had been vacated and that could return to school because of the manifestation determination.

. did return to the school for one (1) day and then withdrew to attend school at U.S.D , Public Schools.

On February 9, 2014 the parties submitted a joint motion seeking to convert the matter from an expedited special education due process hearing to a regular special education due process hearing which was granted on February 20, 2014.

The District filed their Motion to Dismiss on the grounds that the matter is moot and presents no live case or controversy due to the transfer of . from the District to a different school district.

ARGUMENTS AND AUTHORITIES

The District cites the cases of *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-96 (1980) and *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 893-98 (2008) to support their position that both the federal and state courts require a live case or controversy and will not issue advisory opinions. Additionally, in the Kansas case of *Smith v. Martins*, 279 Kan. 242 (2005) the court stated: "The general rule is that an appellate court does not decide moot questions or render advisory opinions. The mootness doctrine is one of court policy which recognizes that it is the function of a judicial tribunal to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case properly brought before it and to adjudicate those rights in such manner that the determination will be operative, final, and conclusive."

In *Lillbask ex re. Mauclaire v. State of Conn. Dept. of Educ.*, 397 F. 3d 77 (2d Cir. 2005), the Court noted that the exception to the general rule regarding mootness is applied only in "exceptional circumstances" and that two conditions must be met: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." The Court noted that "a reasonable expectation of repetition must be more than a mere physical or theoretical possibility."

The Parents argue that the second condition in the Lillbask case applies in that there is a reasonable expectation that . could return to the District inasmuch as his father remains in the school district and that he could be "subjected to the same action again."

The Parents further argue that the expulsion stigmatized . with his fellow students and harmed him in a manner that is harmful toward his future academic and employment prospects. The Parents cite *Goss v. Lopez*, 419 U.S. 565 (1974) which held the removal of a student from classes without adhering to procedural due process requirements violates the Constitution. The Parent argued that the Goss decision explains that an actionable constitutional due process violation occurs when procedural due process violations occur even if the action taken was justified, and the U.S. Supreme Court has recognized the existence of a viable cause of action under 42 U.S.C. 1983. The Parents also cite *Carey v Piphus.*, 435 U.S. 247 which held that "denial of procedural due process should be actionable for nominal damages without proof of actual damages."

The Parent argues that the District's "actions injured . . . justifying compensation is firmly established as a matter of law, and while the question of quantifying those damages is the province of a separate proceeding, it is worth noting the Supreme Court's commitment to quantify damages for violations under 42 U.S.C. 1983."

DECISION

Much of the argument made by the Parents relate to an injury . . . suffered as a result of the actions taken by the District. The Parents are right that there is a remedy for harm pursuant to the 42 U.S.C.1983 when it is established that an individual is deprived of his civil rights. The parents refer to claims for compensation for the expulsion of . . . and the stigmatization and reputation in the eyes of his peers.


The Hearing for Due Process under the Individuals with Disability Education Act does not make provision for an order for damages. (20 U.S.C. 1400-1419 and K.S.A. 72-973 et.seq.). IDEA relates to the premise that a student has a right to a free and appropriate public education (FAPE) in the least restrictive environment which is the basis for this due process. The Hearing Officer is without jurisdiction to enter any order except as it relates to the student's rights under IDEA and Kansas Statutes. That includes any finding of damages or loss the student may receive.

The Hearing Officer finds that the conditions of mootness imposed by the Lillbask case cited above, do not apply. The second condition that "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." In the present case, the expulsion was vacated as a result of the manifestation determination and . . . was returned to the . . . school and the "same action" would be that he would be admitted and enrolled in that school if he returns to the District.

The Parents have filed a Motion for the Hearing Officer to direct the District to make written findings supporting and explaining reinstatement of . . . to re-admission to the District's School from which he had been expelled. There is no provision under IDEA or the Kansas Statutes for a Hearing Officer in a Special Education Due Process Hearing to make such a directive. Again, without specific authorization by the Special Education laws, the Hearing Officer is without jurisdiction to direct the District to make written findings and overrules the Parent's Motion requiring the District to make written findings supporting and explaining reinstatement.


The Hearing Officer finds that there was a procedural violation of IDEA by the District by issuance of the Notice of Expulsion, after the IEP team determined the student's behavior was a manifestation of the student's disability. The Hearing Officer specifically finds that the procedural violation did not result in a violation of FAPE. Accordingly, the Hearing Officer finds that the issues are moot and sustains the District's Motion and Orders the Due Process Complaint be dismissed.

IT IS SO ORDERED this 20th day of May, 2014.


James G. Beasley, Hearing Officer

Certificate of Service

The foregoing Order was sent via facsimile this 20th day of May, 2014 to Mr. _____, parent, Sarah Loquist, Attorney for _____ Special Education Cooperative and USD _____ and Mark Ward, Consultant-Legal for the Kansas State Department of Education.


James G. Beasley, Hearing Officer