BEFORE THE HEARING PANEL
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

XXXXXXXXX,	)
	)
Petitioner/Student	)
v.	)
	)
Wentzville R-IV School District,	)
	)
Respondent	)

ORDER NUMBER 8

(Respondent's Motion To Dismiss Due Process Complaint)

On February 23, 2010, Respondent filed its Motion To Dismiss For Failure To State A Claim. Petitioner responded to Respondent's Motion on April 7, 2010. In its Motion, Respondent argues that Petitioner's Amended Due Process Complaint should be dismissed because: (1) Petitioner failed and/or refused to participate in a Resolution Meeting on December 4, 2009; and, (2) Petitioner is no longer enrolled in the District.

Background

At the beginning of school year 2009-10, the Student was attending Timberland High School in the Wentzville R-IV School District ("District"). Apparently, an Individualized Education Program ("IEP") had been prepared for the Student by the District.[1] As we will see, the sufficiency of that IEP is in question.

The due process complaint ("Complaint") in this case was filed on October 9, 2009, by the Student's Guardian, Ms. On October 20, 2009, Respondent challenged the sufficiency of the Complaint. On October 27, 2009, Respondent convened a Resolution Meeting, which was

[1] The Amended Due Process Complaint indicates that an "IEP was in place as of September 3, 2009. . ."

attended by the Ms. and the Student's Aunt and a friend of the family and by District personnel.[2] The October 27, 2009, Resolution Meeting did not result in a resolution of the issues in the Complaint.

On October 30, 2009, the Hearing Chairperson issued Order Number 1 which found that the Complaint lacked the required specificity and directed Petitioner to file an Amended Complaint. Petitioner filed an Amended Due Process Complaint ("Amended Complaint") on November 18, 2009. On November 30, 2009, Respondent filed a challenge to the sufficiency of the Amended Complaint.

On November 30, 2009, the District sent the Student's guardian a letter which scheduled the second resolution session for December 4, 2009. (Thurman Affidavit ¶ 3). On the afternoon of December 3, 2009, Ms. telephoned the District and informed it that she was not going to attend the Resolution Meeting because it was a "waste of time." On December 4, 2009, Ms. did not attend the scheduled Resolution Meeting. (Thurman Affidavit ¶¶ 4-5).

On December 11, 2009, the Hearing Chairperson issued Order Number 2 which determined that the Amended Complaint was sufficient with respect to the following issue:

> "Whether the District has provided Petitioner with a program of special education and related services which is reasonably calculated to provide him with educational benefit during school year 2009-10."[3]

The Complaint and Amended Complaint state, and the Responses to the Complaint and Amended Complaint confirm, that on or around September 15, 2009, the Student was involved

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[2] Affidavit of Cheri Thurman, Assistant Superintendent of Special Services for Respondent ("Thurman Affidavit") , ¶ 2.

[3] Following a Pre-Hearing Conference with the parties on January 11, 2010, the Hearing Chairperson added a second issue which was: "Whether the Student was evaluated in a timely manner by the District." On January 19, 2010, the Hearing Chairperson issued Order Number 6, which set the hearing in this matter for May 25-27, 2010.

in a fight at school and was ultimately suspended for one hundred fifty-five (155) school days. The parties are in agreement that a timely Manifestation Determination Hearing was held and determined that the Student's conduct on September 15, 2009, was not a manifestation of his educational disability. The issues surrounding the disciplinary action and the Manifestation Determination, are not issues in this matter.

On January 11, 2010, the District received a facsimile from the Moberly School District ("Moberly") which requested that the District provide the Student's education records for transfer purposes. Those education records were provided to Moberly on January 13, 2010 and the Student has not attended school in the District since that time. (Thurman Affidavit, ¶¶ 6-7).

On March 22, 2010, the Hearing Chairperson received a letter from the Student's Mother. The letter stated that the Student was "now back at home with me and no longer resides with his [Ms.], or is under her guardianship." The Student's Mother resides in Sturgeon, Missouri which is in the Moberly School District. The letter also consented to allow the Hearing Chairperson and parties discuss the Student's due process complaint with the Student's Aunt, Ms.

During a telephone conversation with Ms. on April 1, 2010, she confirmed to the Hearing Chairperson that the Student was now a resident in the Moberly School District and was receiving some special education services from that District. Ms. further stated that the Student would not be returning to the Wentzville School District. On April 8, 2010, during a telephone conference with Teri Goldman, Counsel for the District, Ms. confirmed to Ms. Goldman that the Student was a resident of the Moberly School District and "had no intention of returning" to the Wentzville School District.

Discussion

Issue No. 1. Petitioner Failed And/Or Refused To Participate In A Resolution Meeting On December 4, 2009.

The District argues that the Amended Complaint should be dismissed because Petitioner failed to attend the Resolution Meeting scheduled for December 4, 2009. The regulations of the Individuals With Disabilities Education Act ("IDEA") require that within fifteen (15) days following the filing of a due process complaint, the District must convene a meeting with the parents. (34 C.F.R. § 300.510(a)).

> "The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [District] has the opportunity to resolve the dispute that is the basis for the due process complaint."

(34 C.F.R. § 300.510(a)(2)). In this case, on October 27, 2009, after the Complaint was filed, the parties conducted a Resolution Meeting which was unsuccessful. In late November, 2009, the Petitioner filed the Amended Complaint. The IDEA regulations, 34 C.F.R. § 300.508(d)(4) provide that "[i]f a party files an amended due process complaint, the time lines for the resolution meeting . . . begin again . . ." and, therefore, so does the requirement to conduct a Resolution Meeting within fifteen (15) days following the filing of the Amended Complaint.

In our case, the District notified the Student's guardian, Ms. of the Resolution Meeting on November 30, 2009, and on December 3, 2009, the day before the scheduled meeting, Ms. informed the District that she would not attend the Resolution Meeting because, in essence, she thought it was "a waste of time."[4] When a parent refuses to participate in the Resolution

[4] Ms. and the Student's Mother state in their response to Respondent's Motion To Dismiss that they were not made aware of the refusal by Ms. to attend the Resolution Meeting. It is noted here, that at the time the Resolution Meetings were held or scheduled, Ms. was the Student's Guardian and had filed the due process complaint on his behalf. Neither the District nor the Hearing Chairperson had the consent of the Guardian or the Parent to discuss these matters with Ms. and were therefore barred by the Family Educational Rights and Privacy Act from providing her with this information.

Meeting, the IDEA regulations allow the District, "at the conclusion of the 30-day period, [to] request that a hearing officer dismiss the parent's due process complaint." (34 C.F.R. § 300.510(b)(4)).

It is unfortunate that the Student's guardian chose not to attend the Resolution Meeting in December, 2009 because at that meeting the parties may have been able to resolve the issue that was the subject of this due process complaint. The refusal of the Student's Guardian to attend the Resolution Meeting is cause of dismissal of this matter.[5]

Issue No. 2. <u>Petitioner Is No Longer Enrolled In The District And The Matter Is Moot.</u>

The Complaint in this case was filed on October 9, 2009. The District argues that the Complaint should be dismissed because the Student left the District on or around January 11, 2010. It is unclear whether the Student actually attended school at the District between October 9, 2009 and January 11, 2010, in that he was subject to a disciplinary suspension which all parties agree was not caused by a manifestation of his educational disability.

The United States Court of Appeals for the Eighth Circuit has held that "if a student changes his or her school district and does not request a due process hearing, his or her right to challenge prior educational services is not preserved." *Thompson v. Board of Special School District No. 1*, 144 F.3d 574, 579 (8th Cir. 1998). In *Thompson, supra.*, however, the parent filed the due process complaint <u>after</u> the student was removed from the district. Three other Eighth Circuit cases follow the facts and holding in *Thompson, supra.* See: *Independent School District No. 284 v. A.C.*, 258 F.3d 769, 774-775 (8th Cir. 2001) (due process complaint is not

[5] It is noted that Ms. and the Student's Mother, after learning that the guardian had refused to attend the Resolution Meeting, made an effort in April, 2010, to meet with the District. Unfortunately, by that time

moot, even though student left the district, where it involved the question of whether a private placement was appropriate and was filed and heard prior to the student leaving the district); *M.P. v. Independent School District No. 721,* 326 F.3d 975, 981 (8th Cir. 2003) (parents failed to exhaust their administrative remedies when they filed the due process compliant after withdrawing child from the district); and, *J.N. v. Willmar Public Schools, Independent School District No. 347,* 591 F.3d 624, 629 (8th Cir. 2010), (issues presented by due process complaint are moot because it was filed after student was withdrawn from district). There are no Eighth Circuit cases which support the District's argument.

The issue which has been approved for the hearing in this case presents the question of whether the District provided Petitioner with a program of special education and related services which was reasonably calculated to provide him with educational benefit during school year 2009-10. The due process complaint was filed on October 9, 2009. The Student was removed from the District on or around January 11, 2010 and enrolled in the Moberly School District where he is receiving special education and related services.

The remedy for the issue presented by the Complaint, if the Hearing Panel were to find that the District had failed to provide an appropriate IEP for the Student, would be to amend the IEP and perhaps, to provide compensatory educational services. Since the Student has left the District, it has no authority to modify any program of special education and related services for the Student and has no jurisdiction over the Student where he is currently attending school. This factual pattern closely resembles the facts in *Board of Education of Downers Grove Grade School, District No. 58 v. Steven L.*, 89 F.3d 464 (7th Cir. 1996). In that case, the parents of a

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the Student had been removed from the District and even if the Resolution Meeting had occurred, no possible remedy could be fashioned to resolve the issue presented in the due process complaint.

child with a disability filed a due process complaint over the child's fifth grade IEP. The child subsequently moved to another school where a new IEP was written for him. The Court found that the case was moot since the parents had already agreed to a new IEP with a different school district and were, therefore, without an actual injury traceable to the original school district that could be redressed by a favorable judicial decision. *Downers Grove, supra.*, at 469. See also: *Brown v. Bartholomew Consolidated School Corporation,* 442 F.32 588, 600 (7th Cir. 2006); and, *School District of River Falls v. Iversen*, 210 F.3d 376, 2000 WL 274159 (7th Cir. 2000).

Even if the Hearing Panel finds that the District failed to implement the Student's IEP during the beginning of school year 2009-10, since the Student will not be returning to the Wentzville School District, there is no appropriate remedy that can be fashioned. Any decision by the Hearing Panel would merely be an "advisory opinion" with no possible remedy.

Order

IT IS HEREBY ORDERED that Petitioner's due process complaint which was filed on October 9, 2009, is dismissed for the reasons set forth above and the hearing scheduled for May 25 through May 27, 2010 is cancelled.

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Ransom A Ellis, III
Hearing Chairperson

CERTIFICATE OF SERVICE

This Order has been served by regular United States Mail, with courtesy copies sent by facsimile (where facsimile numbers were provided to the Hearing Chairperson) on the following persons on this 13th day of April, 2010:

Guardian of Student

Aunt of Student

Ms. Teri B. Goldman
Mickes, Goldman & O'Toole, LLC
Suite 240
555 Maryville University Drive
St. Louis, MO 63141

Ms. Cynthia Lynch
2752 Storm Lake Drive
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Dr. Terry Allee
5 Apache Drive
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Ms. Jackie Bruner
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Ransom A Ellis, III