

**BEFORE THE HEARING OFFICER FOR THE  
STATE DEPARTMENT OF EDUCATION**

Student [REDACTED] by and through	)	H-15-05-08
the Parent [REDACTED]	)	
	)	
Petitioner,	)	<b>MEMORANDUM</b>
vs.	)	<b>DECISION AND ORDER</b>
	)	
	)	
Independent School District of Boise City #1)	)	
	)	
District.	)	
_____	)	

**Introduction**

[REDACTED] (the Parent) filed a request for an IDEA Due Process Hearing on behalf of a child with a disability (the Student) which was received by the Idaho state Department of Education Special Education Division on May 8, 2015.

The Independent School District of Boise City No 1 (the District) filed a Motion to Dismiss or Alternatively a Motion for Summary Judgment on May 18, 2015. The Parent responded to the District's motion on May 21, 2015. The District replied on May 29, 2015 with a Reply Brief and Supporting Affidavit. The Parent responded in a Memorandum and without supporting affidavit included two exhibits on June 1, 2015.

The parties met in a Resolution Session pursuant to 34 CFR 500.510 and no resolution was reached. The resolution period has concluded and it is now appropriate and timely to consider the District's Motion to Dismiss or Alternatively Motion for Summary Judgment.

**MEMORANDUM  
DECISION AND ORDER**

This Memorandum Decision and Order constitutes Findings of Fact and Conclusions of Law regardless of the form of the Memorandum Decision that follows.

### **Procedural History**

This Request for an IDEA Due Process Hearing is the fourth Request for a Due Process Hearing filed by the Parent on behalf of the Student since March 2015. All four of the cases have been assigned to this Hearing Officer. In Due Process Hearing Request Case No. H-15-02-25, a Resolution Session meeting resulted in the Parent withdrawing the request for Due Process Hearing. A second Request for Due Process Hearing Case No. H-15-03-18 was resolved in a facilitated Resolution Session meeting and the Request for Due Process Hearing was withdrawn by the Parent. The third Request for Due Process Hearing Case No. H-15-03-27 was dismissed with prejudice by a Memorandum Decision and Order of this Hearing Officer on March 20, 2015.

### **Appropriateness of ruling on a Pre Hearing Motion to Dismiss or for Summary**

#### **Judgment.**

The Idaho State Administrative Procedures Act permits a Special Education Hearing Officer to consider and decide Pre Hearing Motions with or without oral argument, IDAPA 04.11.01.565. Oral Argument is not necessary here and it is appropriate to consider the District's Motion to Dismiss or Alternative Motion for Summary Judgment. Since the parties have introduced facts into the Record in addition to the facts originally pled by the Parent, it is appropriate to consider the Motion for Summary Judgment.

The Parent is self-represented and is given some leeway in the manner in which documents are submitted or how arguments are made in the prehearing process. However

self-represented parents in this setting are still required to offer sufficient facts to create material questions of fact to avoid Summary Judgment.

A material factual question goes to whether it's more likely than not that events occurred as have been alleged, giving the Parent the benefit of the doubt as to the interpretation of the facts that are contained in the record.

The Hearing Officer should be satisfied that there are no material questions of fact and that a party is entitled to relief as a matter of law in order to grant Summary Judgment.

Important here, there is no dispute about the factual basis of the Parent's cause of action. The Parent has not submitted any affidavits other than what was supplied in the unverified Due Process Hearing Request and additional documentation which is attached to the Parent's formal responses or submitted separately. Instead the disagreement here is about what those facts should mean.

Additionally, the Hearing Officer is to determine whether the Individuals with Disabilities in Education Act (IDEA), its regulations and interpretive law provide a basis to grant the remedy sought by the Parent.

#### **Application of res judicata**

The District argues that res judicata precludes the Parent from proceeding to assert the IDEA claims in this action based on the Hearing Officer's decision in Case No. H-15-03-27.

Res judicata applies when there is an identity of claims, a final judgment on the merits and privity between the parties and can apply in this administrative setting.

An identity of claims exists when two arguably separate actions arise from the same transactional nucleus of facts. *Jaylynn Bacon-Dorow, v, Prescott Unified School District No. 1*, 114 LRP 49111. Res judicata is intended to address not only the claims that are actually litigated but the claims that could have been asserted in the prior action.

Additionally, in this setting, an analysis of the fairness of applying res judicata is appropriate and requires the Hearing Officer to consider among other things whether the parties are given an adequate opportunity to litigate their claims. See for example *S.M. by and through his Guardian ad Litem, J.R., v. San Jose Unified School District, et al.*, 115 LRP 16137. This requires a consideration of the factual basis of the claims made in Case No. H-15-03-27 in light of the factual basis for the claims made here and a determination of whether the Parent has been given an appropriate opportunity to adequately present their claims.

In this context the Hearing Officer should also consider the provisions of 34 CFR 300.513(c) permitting a parent to file a “separate due process complaint on an issue separate from a due process complaint already filed”. However, it is clear that the application of res judicata can be appropriate in considering multiple administrative actions brought under IDEA. 34 CFR 300.513 (c) does not bar the application of res judicata to essentially similar multiple actions.

#### Analysis

The District contends that the factual basis for the allegations made in this request for Due Process Hearing were disposed of by the Memorandum Decision and Order entered in Case No. H 15-03-27 and that the Parent is precluded from continuing with this administrative action based upon res judicata. Specifically the District contends that

all of the IDEA issues raised here were or could have been raised in Case No. H-15-03-27.

The Parent contends that the issues raised in this Hearing Request are different from the issues raised in Case No. H-15-03-27 and if not different, that the Hearing Officer failed to dispose of all of the issues raised in Case No. H-15-03-27. The Parent also contends that there are additional facts alleged here which support additional or alternative causes of action for which the Parent is entitled to a remedy.

In this request for Due Process Hearing, the Parent contends that the District violated IDEA by failing to implement the Student's Behavioral Intervention Plan (BIP). The Parent also contends that the School District lowered the performance benchmarks for determining whether progress occurred toward completion of IEP goals without parental agreement in May 2013 and failed to timely convene an IEP team meeting in May 2013.

The Student was suspended for an undisclosed period of time as a result of behavior occurring in May 2013 in the Elementary School Principal's Office. The Parent contends that the Student's behavior was a result of the Student not receiving the behavioral interventions provided in the Student's BIP. The Parent contends the District failed to conduct a suicide assessment or provide additional supports or services to address the Student's suicide ideation.

On May 13, 2013, the Student became angry after being pushed by another student. The Parent contends that the Student was not provided counseling to assist with the resolution of the Student's anger.

On May 14, 2013, the Parent reported to the District that the Student was being bullied and was being emotionally hurt by other students' conduct. The essence of the Parent's argument here is contained in the following: "(District's) failure to take corrective action to stop the bullying resulted in their failure to provide an environment conducive to learning for the Student pursuant to Idaho Code § 33-1612 thereby failing to provide FAPE".<sup>1</sup>

On May 15, 2013 the Student made a socially inappropriate comment about girls and was told by District personnel to keep one's opinions to themselves. The Parent contends that the counseling, role-playing and training services provided in the Student's BIP were not provided to the Student on this occasion.

On May 20, 2013 behavioral intervention documentation was provided to District employees which did not include references to the events described on May 13<sup>th</sup>, May 14<sup>th</sup> and May 15<sup>th</sup>, 2013. Also on May 20, 2013, the Student reportedly had a difficult time following instructions and rotating from group to group in an informal group activity which the Parent contends resulted in the Student being emotionally distressed and experiencing suicide ideation. The Parent also contends the District's "failure to follow the Student's IEP and BIP and the inequitable response to bullying and harassment resulted in a hostile environment which was not conducive to learning".

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<sup>1</sup> Idaho Code § 33-1612 describes the Idaho Legislature's aspiration that a "through" system of public education provides "a safe environment conducive to learning". Idaho Code § 33-1612 does not create a private right of action enforceable in an IDEA Due Process Hearing Request pursuant to 34 CFR 300.507(a)(1).

The Parent's argument here appears to be that the Student was being bullied because the Student was displaying emotional distress at school and that the District failed to respond to the bullying that the Student was suffering. Because the District failed to respond to the bullying, the Parent argues, the Student's behavior was exacerbated which the Parent concludes indicates the District failed to provide an appropriate educational environment for the Student resulting in a denial of FAPE.

The Parent then recites in substantial detail events occurring between September 12<sup>th</sup> and September 30<sup>th</sup> concluding in the Student's withdrawal from attendance in the District enrollment in the [REDACTED] Academy, a public online charter school. These specific factual events formed the factual basis for the Parent's prior Request for a Due Process Hearing, Case No. H-15-03-27.

In its prayer for relief here, the Parent requested reimbursement for the costs of providing an educational environment that did not exacerbate the Student's behavior, specifically referencing the provision of in-kind services to the Student by the Parent as a learning coach while the Student was not enrolled in the District. The Parent also requests compensatory education in the social skills areas based upon a treatment plan offered by the Student's Social Worker (R. Doc #2). Finally the Parent requested District training in the Student's IEP, BIP and Positive Behavioral Supports.

In response to the District's res judicata analysis, the Parent contends that privity between the parties does not exist. The Parent argues that not all the issues raised in the prior request for Due Process Hearing were considered or ruled on by the Hearing Officer, in particular the allegedly improper handling of discipline and that there was no resolution of whether bullying contributed to the Student's suicide ideation.

Though at some time in the recent past the Student's Parents were divorced, it is clear that the Petitioner here was also the Petitioner in Case No. H-15-03-27 and that the Parent as the Petitioner is acting on the same Student's behalf in this matter. The Parent here acting on the Student's behalf is the same party in H-15-03-27.

The legal relationship of the Parents set out in the parties Decree of Divorce does not create a lack of privity between the Petitioner here and the Petitioner in Case No. H-15-03-27. The individual Parent here has the other unnamed Parent's consent to act on the Student's behalf. The parties are the same petitioner and respondent in both cases. Privity for res judicata purposes is present here.

In granting Summary Judgment in H-15-03-27, this Hearing Officer concluded that the Parent's unilateral withdrawal of the Student from the District's Elementary School and failure to make the Student available for a Functional Behavioral Assessment precluded the Parent's ability to proceed on claims that the Student did not receive a Free and Appropriate Public Education (FAPE) in September 2013. The facts highlighted for the Hearing Officer in this matter and the factual allegations and contentions based on those facts are part of the same "transaction or series of transactions" out of which the parent's claim arises.

It is then necessary to consider whether the same causes of action presented here were disposed of by summary judgment in Case No. H-15-03-27. Res judicata turns on the "essential similarity of the underlying events giving rise to the various legal claims", *Blunt v. Lower Merion School Dist.*, 767 F.3d 247, (Ct. App. 2014). The Third Circuit there citing Restatement 2<sup>nd</sup> of Judgment § 24(2) concludes that a "claim extinguished by res judicata includes all rights of the plaintiff to remedies against the defendant with

respect to all or any part of the transaction or series of connected transactions out of which the action arose”.

A State Administrative IDEA Hearing Officer in Kansas employed a District of Columbia District Court analysis to determine whether the same nucleus of facts was at issue. The Hearing Officer considered “whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit and whether the treatment as a unit conforms the parties expectation of business understanding or usage”, (internal citations omitted) *In re Student with a Disability 115 LRP 6725*. Again in this IDEA setting, the Hearing Officer there included a reference to Restatement 2<sup>nd</sup> of Judgments § 24 (2).

It is clear that the factual setting for the Parent’s claims are related in time. The actions or inactions of the District in implementing the Students IEP and BIP in May 2013 and September 2013 are related in time based upon the description by the Parent of the actions or inaction of the District. The Parent indicates that the circumstances occurring at the end of school in May 2013 resulted in a recommendation that the District would determine if additional behavioral interventions were appropriate based on the Student’s behavior at the beginning of the next school year, September 2013. In other words the District was to consider whether additional or different services should be provided based on the Student’s performance in September 2013 considering what had occurred on May 2013.

The provision of special education and the implementation of the Student’s IEP and BIP would require consideration of what occurred in May 2013 and September 2013. Even though the May 2013 and September 2013 factual allegations occur in two separate

school years, the District's decision to consider the Student's behavior in May 2013 in the context of how the Student performs in September 2013 is reasonable. The implementation of the Student's IEP is not confined to a School Year. A Student's IEP can be reviewed when appropriate during its effective term. As found in Case No. H-15-03-27 the District acted timely and appropriately in scheduling an IEP Team meeting in September 2013 and requesting consent for a Functional Behavioral Assessment.<sup>2</sup>

The allegations of events occurring in May 2013 and September 2013 are impossible to separate into two distinct and independent factual basis for the Parent's claims and are related in time.

All of the Parent's factual allegations occur at the District's Elementary School and are therefore related in space.

All of the facts originate from the same alleged actions or inaction of the District's employees in May 2013 or September 2013.

The factual circumstances occurring either in May 2013 or in September 2013 describe the same cause of action. Those facts as submitted as a whole by the Parent, form a convenient factual basis for hearing and treating those facts collectively conforms to the Parent's expression of the important facts which have been advanced for the Hearing Officer's consideration.

The factual basis for this request for Due Process Hearing are the same that would have been considered had summary judgment not been granted in Case No. H-15-03-27. For example, the Parent contended in Case No. H-15-03-27 that the District should have

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<sup>2</sup> The Parent here specifically indicates in regard to the District's "offer to reevaluate the Student on October 8, 2013, the problem was not the Student or the content of the Behavioral Intervention Plan but rather it was the behavior of the school personnel and a reevaluation would not change their behavior".

conducted a Functional Behavior Assessment. Summary Judgment was granted finding that the District did not violate IDEA by failing to provide a Functional Behavior Assessment. Here, the Parent argues that the District was obligated to conduct an assessment of the Student's suicide ideation. The Summary Judgment in H-15-03-27 found that the District was under no obligation to conduct an evaluation, whether it is termed a Functional Behavior Assessment or now an evaluation of the Student's suicide ideation.

The Parent has consistently through these two proceedings indicated that it was the failure of the District to implement the Student's IEP and BIP which resulted in the District's denial of FAPE to the Student. The facts which support the Parent's contention in this case are the same facts which were presented or should have been presented in support of the Parent's claims in Case No. H-15-03-27.

It is appropriate to treat the facts of May 2013 and September 2013 as a convenient unit for hearing based upon the Parent's expectation that the District would consider the Student's IEP and BIP in September 2013. The causes of action and factual basis for those causes of action are indistinguishable here from the causes of action and the factual basis for those causes of action in Case No. H-15-03-27.

The factual basis for the claims made in this case and in Case No. H-15-03-27 are intertwined and related in time, space, origin or motivation. The facts as provided by the Parent form a convenient unit for purposes of an administrative hearing. Treating the facts as a convenient unit for purposes of hearing reflects the factual circumstances of the Student's attendance at the District and would be consistent with how to best determine whether FAPE was provided to the Student.

Any claim related to the identification, evaluation and educational placement or the provision of FAPE to the Student in May or September 2013 was addressed in the Summary Judgment granted in H-15-03-27. The relief sought by the Parent in response to the allegation that the District had failed to provide FAPE was raised and was disposed of in the Summary Judgment granted in H-15-03-27.

The Parent now contends that the Student suffered mental harm as a result of the bullying suffered by the Student compounded by the District's alleged failure to implement the Student's then existing IEP. As was previously indicated in the Memorandum Decision and Order in Case No. H-15-03-27, the Parent's perceived dilemma about how best to advocate on the Student's behalf created understandably difficult decisions.

However, whether the Student was actually being bullied does not indicate that the District had failed to implement the Student's IEP. The existence of bullying would not as a matter of law be a basis to conclude that the District had failed to provide the Student a Free and Appropriate Public Education (FAPE).

The Parent's request for Due Process Hearing here would appear to be an attempt to clarify the nature of the Parent's claims against the District. The Parent now characterizes the issue before the Hearing Officer as the Parent's efforts to meet a "requirement of IDEA to exhaust administrative remedies to pursue remedies in federal court for past harm caused to (the Student) and (the Student's family) by the District". There is no requirement in IDEA that the Parent exhaust administrative remedies to pursue claims of 'past harms' against the Student, which for these purposes have been characterized by the Parent as "mental harm" suffered by the Student.

To the extent that the Parent seeks damages for injuries resulting from allegations that the Student was being bullied or that the District personnel disregarded that the bullying was affecting the Student's behavior, (which the Parent characterizes as mental harm), are independent causes of action which do not arise under the IDEA, *E.T. by his Parents v. Bureau of Special Education Administrative Law Appeals, Massachusetts Department of Elementary Education, Andover School District, 115 LRP 10216*. There the Court also considered the application of res judicata indicating that "the mere fact that different legal theories are presented in each case does not mean that the same transaction is not behind each" (internal citations omitted).

Any claim for injuries which are characterized by the Parent as mental harm are beyond this Hearing Officer's jurisdiction and cannot be considered. Additionally the District's failure to conduct an evaluation of the Student's suicide ideation or a Functional Behavioral Assessment based on the Student's behavior was specifically addressed in the Memorandum Decision granting summary judgment in Case No. H-15-03-27.

As indicated in the Summary Judgment granted in H-15-03-27, the Parent's unilateral withdrawal of the Student from attendance in the District and the resulting inability of the District to evaluate the Student to consider the appropriateness of the Student's then existing IEP continues to preclude the relief sought by the Parent.

The subsequent enrollment of the Student in the [REDACTED] Academy [REDACTED] does not entitle the Parent to compensatory education or reimbursement for in-kind services provided by the Parent as a learning coach for the Student. There is no demonstration in this record that the Parent actually incurred any expense in providing

learning coach services for the Student. The Parent's Divorce Decree is not helpful to determine if there is a reasonable value of the Parent's in-kind services as the Student's learning coach. [REDACTED] is a public charter school and is not a private placement which would otherwise entitle the Parent to reimbursement. There is no basis in IDEA for a claim of reimbursement for in-kind learning coach services in helping the Student access the general education curriculum in another public school.

The Parent finally indicates that the Hearing Officer can order the District to provide proper training in the implementation of the Student's Behavioral Intervention Plan and IEP. The IEP in place in May 2013 and September 2013 is not the IEP in place now. As indicated in the Memorandum Decision in Case No. H-15-03-07 it would be inappropriate to order that the District conduct training in the implementation of an IEP or a BIP which is no longer in effect.

The remedies sought here are simply a recharacterization of the remedies sought in Case No. H-15-03-27.

While the Parent seeks to clarify and provide additional information for the Hearing Officer's consideration in this case, it is clear that res judicata precludes the Parent from proceeding in this administrative setting on the repetitive claims related to the implementation of the Student's IEP and BIP which existed in May 2013 and September 2013.

The IDEA claims made or that could have been made were resolved in the Memorandum Decision and Order in Case No. H-15-03-27 and any further proceedings are barred by res judicata.

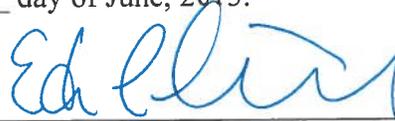
**The Parent's Motion for Summary Judgment**

The Parent also moved for Summary Judgment arguing that the District by its failure to deny the Parent's factual allegations of the mental harm that the Student had suffered, had conceded that the Student had suffered mental harm thereby concluding that that the District had admitted that the Student was denied FAPE. Whether the Student suffered mental harm is not an issue before the Hearing Officer in the IDEA setting. The Parent's Request for Summary Judgment is denied.

**Order**

The District's Motion for Summary Judgment is granted and this matter shall be and is hereby dismissed with prejudice.

DATED this 16 day of June, 2015.



\_\_\_\_\_  
Edwin L. Litteneker  
Hearing Officer

I DO HEREBY CERTIFY that a true  
And correct copy of the foregoing  
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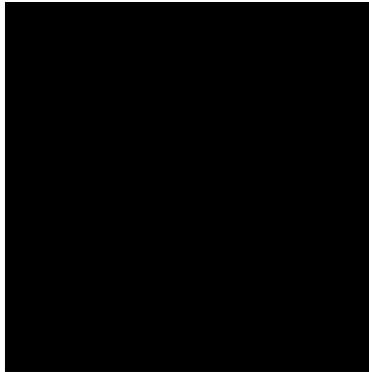
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To:



Elaine Eberharter-Maki  
Moore Smith Buxton & Turcke, Chtd  
950 W. Bannock Street, Suite 520  
Boise, Idaho 83702  
[ees@msbtlaw.com](mailto:ees@msbtlaw.com)

On this 16 day of June, 2015.

A handwritten signature in blue ink, appearing to read "Ed Litteneker".

Edwin L. Litteneker