

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

[REDACTED], a Student, by and through the Student's parent,	)	H-15-03-27
	)	
Petitioner,	)	<b>MEMORANDUM</b>
vs.	)	<b>DECISION AND ORDER</b>
	)	
	)	
Independent School District of Boise City #1)	)	
	)	
District.	)	
_____	)	

**Introduction**

[REDACTED] (Parent) filed a request for Due Process Hearing on behalf of a child with a disability (Student) on March 27, 2015. The Independent School District of Boise City No. 1 (District) filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment on April 6, 2015.

The Resolution Period as provided for by 34 CFR § 300.510 has concluded and the parties advise that there is no resolution forthcoming of the allegations made in the March 27, 2015 Due Process Hearing Request. It is then appropriate and timely to consider the District's Motion to Dismiss or in the Alternative Motion for Summary Judgment.

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 & Chronology

This case is the third request for a Due Process Hearing filed by the Parent on behalf of the Student since March 2015. All three cases were assigned to this Hearing Officer.

In Due Process Hearing Case No. H-15-02-25, a Resolution Session was held resulting in the Parent withdrawing the Request for a Due Process Hearing and the Due Process Hearing Request was dismissed without prejudice on March 20, 2015.

A second request for a Due Process Hearing (Case H-15-03-18) was filed on March 18, 2015. This case is currently pending, however, the parties have advised that as a result of the Resolution Session the issues raised have been resolved and the Request for a Due Process Hearing will be withdrawn by the Parent.

This Request for a Due Process Hearing, (Case H-15-03-27) generally characterizes the issue for the Hearing Officer's consideration as a deprivation of the Student's right to a Free and Appropriate Public Education based upon an IEP in place in September 2013. The Parent makes the following allegations: the District improperly handled disciplinary actions involving the Student in September 2013; the District failed to timely and properly initiate appropriate assessments following the Student's discipline; the District conducted a Threat Assessment under the District's Policies and Procedures which did not comply with the IDEA; and the Threat Assessment conducted by the District did not permit Parent participation. Generally, these allegations contend that the District failed to timely and appropriately conduct a Functional Behavior Assessment (FBA).

For purposes of the consideration of this Motion to Dismiss or Alternative Motion for Summary Judgment the following facts are not in dispute.

The Student attended [REDACTED] Elementary School in September, 2013. On September 3, 2013 the Student intentionally hit another Student.

Discussions then occurred between the District Representatives and the Parent about conducting a Functional Behavior Assessment.

On September 11, 2013, the District's School Psychologist advised the Parent that the District wanted to wait until the Student's annual IEP Team Meeting scheduled in October 2014 to consider whether a Functional Behavior Assessment was appropriate.

On September 12, 2013, the Student threatened another Student resulting in a three day out of school suspension.

Also on September 12, 2013, the District conducted a Threat Assessment, a copy of which was provided to the Parents after the Threat Assessment was completed.

On September 17, 2013, the District sent an Invitation to the Parents for an IEP Team Meeting to be held on October 8, 2013 and a consent for a Functional Behavioral Assessment.

On September 18, 2013, the Parents returned the Consent for a Functional Behavioral Assessment to the District.

On September 27, 2013, the Student was withdrawn from school with the Parent's representation that the Student would be homeschooled.

The Student was then enrolled in the [REDACTED] and did not attend [REDACTED] Elementary School after September 27, 2013.

The District contends that they are not required to conduct a Functional Behavioral Assessment based upon the discipline imposed upon the Student and that the District timely and appropriately proposed commencing a Functional Behavioral Assessment pending the Student's October IEP Team Meeting. Additionally, the District Court contends that after the Parents consent to the Functional Behavioral Assessment, the Student's withdrawal from School eliminated any opportunity or obligation to conduct a Functional Behavioral Assessment.

Additionally, the District responds that the Threat Assessment is not an IDEA assessment or evaluation requiring either parental consent or parental participation as required by the IDEA. The Threat Assessment conducted pursuant to District Policy may trigger a Functional Behavioral Assessment for a Special Education Student, however, since the Student was no longer enrolled in the District, the District did not have an opportunity nor were required to conduct a Functional Behavioral Assessment. The Student may well have a right to an appropriately conducted Threat Assessment but that is not an issue arising under IDEA nor is there an IDEA Due Process right to an appropriately conducted Threat Assessment.

At some point in time prior to February 2015, the Student reenrolled at [REDACTED] Elementary and an IEP Team Meeting had been held. The Parents were provided with the IEP and written notice of the District's intent to implement the IEP on March 17, 2015. On March 18, 2015 Consent for Initial Placement in Special Education was returned however, hand written comments indicating multiple objections and rejections of the IEP were made by the Parent.

The District notified the Parent that Consent had not been received and Special Education for the Student would not commence until consent was received.

The Parent provided consent to Special Education Services on behalf of the Student on April 16, 2015.

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

**Judgment.**

The Idaho State Administrative Practice 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 and it is appropriate to consider the District's Pre Hearing Motion to Dismiss or Alternative Motion for Summary Judgment. Since the parties have introduced facts into the Record in addition to the facts pled by the parties it is appropriate to consider the Motion for Summary Judgment.

In this setting 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. The parents are self-represented and are given some leeway in the manner in which documents or arguments are submitted in the pre hearing process, however, self-represented parents in this setting are still required to raise sufficient facts to create material questions of fact to avoid Summary Judgment.

A factual question for purposes of Summary Judgment is something different than disagreeing about what the facts mean, instead a material factual question to avoid Summary Judgment goes to whether it is more likely than not that events occurred as have been alleged giving the Parents in this setting the benefit of the doubt as to the interpretation of the facts that are submitted. The Parents do not disagree with the facts

as are set out above but instead argue that the facts mean something different than what the District argues.

Additionally, the Hearing Officer is to determine whether the Individuals with Disability in Education Act (IDEA), its regulations and interpretive case law provide a basis to grant the remedies sought by the Parents. The Parents have requested that the District reimburse the Parents for providing FAPE at their private expense, which are the Parent's costs of enrolling the Student in the [REDACTED] upon the Student's withdrawal from [REDACTED] Elementary in September of 2013. The Parents also request that the District expunge the Threat Assessment Report from the Educational Record of the Student and finally that the current IEP be implemented.

Though the remedies requested by the Parents do not substantially correspond to the allegations that are made, this Memorandum Decision and Order will address both the allegations raised by the Parents and the Parent's proposed remedies.

#### Analysis

The Idaho Special Education Manual 2000, Revised 2009 permits the District to remove a Special Education Student from the Student's current placement to another setting for no more than ten consecutive days. The District is entitled to suspend Student including a Special Education Student for up to ten cumulative days in a school year for violations of the Student Code of Conduct. Where a building Principal disciplines a Special Education Student for up to five school days, Special Education Services are not required, 34 CFR § 300.530(d).

A Functional Behavioral Assessment is only required where a Student's current placement has changed as a result of discipline which exceeds ten consecutive school

days or if a Student's placement is changed to an Interim Alternative Educational Setting, 34 CFR 300.530. There is no requirement that upon being disciplined that a Special Education Student is entitled as a matter of law to a Functional Behavioral Assessment if the discipline is less than ten days or an Interim Alternative Educational Setting is not proposed.

The Student here was not suspended for more than ten cumulative school days and as a result the Student is not entitled to a Functional Behavioral Assessment as a matter of law. However, the Student's behavior on September 3, 2013 and September 12, 2013 indicated that it was appropriate for the District to conduct a Functional Behavior Assessment to consider amendments to the Student's Behavioral Intervention Plan based upon an apparent escalation of the Student's physically aggressive behavior. Even if a suspension for more than ten days were proposed, a Functional Behavior Assessment may not be required if the IEP Team were to meet to consider modifying the Behavioral Intervention Plan to address the Student's behavior, 34 CFR § 300.530(f).

The District initially determined that a Functional Behavioral Assessment would not be necessary based upon the September 3, 2013 event. However, after the September 12, 2013 event, the District timely and appropriately on September 17, 2013 invited the Parents to an IEP Team Meeting to be held October 8, 2013 and requested that the Parents consent to a Functional Behavioral Assessment. The Consent was timely returned by the Parents on September 18, 2013. On September 27, 2013 the Student was withdrawn from attendance at the District's Elementary School. The unilateral withdrawal from the District's Elementary School prior to the October 8, 2013 IEP Team Meeting ultimately disposes of the Parent's request for a Due Process Hearing.

**MEMORANDUM  
DECISION AND ORDER**

The District was denied an opportunity to conduct a Functional Behavioral Assessment upon the Student's being withdrawn from [REDACTED] Elementary. As a result of the Student's withdrawal from the District there is no denial of FAPE based on the District's failure to conduct a Functional Behavior Assessment.

The Parents argue that their decision to withdraw the Student from [REDACTED] Elementary was to protect the Student from bullying that the Student was suffering. While it may be true that the Student was being bullied, the Parents decision to withdraw the Student from school (which may well be understandable), did not give the District an opportunity to address the Student's behavior even if the behavior was in response to bullying. Additionally, the fact that the Student was being bullied is not proof that the Behavioral Intervention Plan then in place was inappropriate. Finally whether the Student was being bullied and the District's response to the bullying is not an issue under the IDEA.

The Parents contend though that the District's conduct of a Threat Assessment pursuant to the District's Policies and Procedures constitutes an assessment under IDEA which requires the Parent's participation.

An assessment or Functional Behavior Assessment are not defined in 34 CFR § 300.4 et seq. An evaluation is defined "as procedures used in accordance with 34 CFR § 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the Special Education and related services that the child needs." 34 CFR § 300.15

The Threat Assessment was conducted by the District pursuant to its Threat Assessment Protocol. Though the Student may have a right to a properly conducted Threat Assessment consistent with the District's Threat Assessment Protocol, IDEA does not require that a Threat Assessment occur nor is a Threat Assessment an assessment for purposes of making a change in the placement or services provided to a Special Education Student. There is no demonstration that the District's Threat Assessment Protocol requires parental participation. IDEA does not require parental participation in the Threat Assessment.

The September 12, 2013 Threat Assessment Report indicated that the District had determined that a new Functional Behavioral Assessment should be conducted which "may result in revisions to the Student's Behavioral Intervention Plan." Additionally, the Threat Assessment Report indicated that the IEP Team would consider "additional services and identify precipitating and aggravating circumstances" through a Functional Behavioral Assessment.

Any action to be taken by the District in light of the Threat Assessment was to occur in the context of the Student's IEP Team and if appropriate the IEP Team would revise the then existing Behavioral Intervention Plan. There is nothing in this record which indicates that the District acted improperly in conducting the Threat Assessment or in proposing to conduct a Functional Behavioral Assessment.

The Parents separately contend that inappropriate descriptions of the Student's behavior are contained in the Threat Assessment Report which should be struck from the Student's official Educational Record. The redaction of the Student's Educational Record is not an issue that is before the IDEA Hearing Officer.

The Hearing Officer has no authority under IDEA to consider a redaction or modification of a Student's record which is unrelated to the identification, eligibility or the provision of FAPE to the Student. The Threat Assessment Report clearly indicates that whatever evaluations would occur would be in the IDEA IEP Team Meeting setting. The use of a Threat Assessment to describe the process used by the District does not make the Threat Assessment an IDEA evaluation under these facts. Additionally, there is no showing that the Threat Assessment was not conducted consistent with the District's Threat Assessment protocol.

The Parents unilateral withdrawal of the Student from [REDACTED] Elementary School prior to the IEP Team Meeting scheduled for October 8, 2013 eliminates any basis for the Parent to be reimbursed for any expenses incurred by the Parents in providing FAPE at their expense. Additionally, the record does not reflect that any expense was incurred by the Parent upon the enrollment of the Student in the [REDACTED]

Upon the reenrollment of the Student in the District, the Student's IEP Team met in March 2015. An IEP is now in place which has been consented to by the Parents. The District treated the Student as a newly enrolling Student and appropriately sought parental consent prior to the implementation of the Student's IEP. The implementation of the Student's current IEP is not an issue in this case.

**Decision & Order**

Based on the foregoing analysis, the District is entitled to Summary Judgment on all of the issues presented in this proceeding, H-15-03-27.

Summary Judgment is granted. The Hearing scheduled for May 22, 2015 is vacated. Case H-15-03-37 shall be and is hereby dismissed with prejudice.

DATED this 30 day of April, 2015.



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Edwin L. Litteneker  
Hearing Officer

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

Mailed by regular first class mail,  
And deposited in the United States  
Post Office

Sent by email

Sent by facsimile

Sent by Federal Express, overnight  
Delivery

Hand delivered

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 1 day of May, 2015.

Edwin L. Litteneker