IMPARTIAL DUE PROCESS HEARING

BEFORE THE HEARING OFFICER
APPOINTED BY THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS

STATE OF NEVADA

In the Matter of	Date: October 7, 2022
STUDENT[1], by and through Parent,	Representatives:
Petitioners, v. SCHOOL DISTRICT,	Petitioners: Self-represented Respondents: Yasmin Rodriguez-Zaman, Esq.
Respondent.	Hearing Officer: Jamie Resch

DECISION OF THE HEARING OFFICER

Introduction

A due process complaint was filed by the proper person parent on May 19, 2022. A preliminary order documenting the appointment of the Hearing Officer was issued on May 31, 2022. On June 14, 2022, the District responded to the due process complaint. Resolution efforts were not successful during the thirty-day resolution period. A final prehearing report and order was issued on September

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution. See *Letter to Schad* (FPCO 12/23/04).

6, 2022. Jurisdiction over this IDEA complaint is proper under NRS 388 et. seq. and 34 CFR 300.510(c), 300.510(c), 300.511.

The due process hearing took place on September 26 and 27, 2022. At the hearing, Hearing Officer Exhibits 1 through 10 were admitted without objection. District Exhibits 1 through 21 were admitted without objection. Parent Exhibits 1 though 3 were admitted without objection. All proposed exhibits were therefore admitted and made part of the record. The decision in this matter is due October 14, 2022, as the previous decision due date of August 2, 2022 was extended by finding of good cause. See Hearing Officer Ex. 10.

Preliminary Matters

The pre-hearing conference in this matter was held on June 29, 2022. The issues were clarified at the pre-hearing conference and are set forth below. Parent elected a closed hearing and to have the student present, and the hearing itself was held virtually due to the ongoing pandemic. Parent appeared on video during the duration of the hearing.

ISSUES

The issues to be determined, which were agreed to by the parties at the prehearing conference and again at the beginning of the due process hearing, and which are stated in the prehearing order, are as follows: (1) Whether safety concerns resulted in the denial of a free appropriate public education from April 1, 2022 through completion of summer school, and (2) whether the student was denied a free appropriate public education when the district declined to offer transportation services to Elementary School 2 [ES2].

FINDINGS OF FACT

After considering all the evidence, this Hearing Officer's Findings of Fact are set forth below. The hearing was held in a 100% virtual format as a result of the ongoing pandemic.

Certain basic facts were undisputed by the parties and those are discussed briefly below. The discussion then turns to the disputed facts concerning safety issues chiefly at Elementary School 1 [ES1] as well as the lack of District-provided transportation to ES2.

1. It was undisputed that: The student was located through child find, was three years old, attended pre-K classes starting in March 2022, and is eligible for special education services under the autism spectrum disorder category.

District Ex. 7. Pertinent enrollment history in the district was also undisputed in that Student enrolled at ES1 and the student's first day there was March 28, 2022. District Ex. 1-3.

2. As testified to by the Assistant Principal of ES1 [AP], the Student only ever had one IEP, and that IEP provided for curb to curb transportation ten times a week. See District Ex. 9 (IEP dated March 23, 2022). Student's placement was the self-contained classroom. Given the lateness of the student's enrollment into the school year, ES1 was the closest school to Student's house that both had the required "Kids" self-contained program as well as an open seat. Testimony of Director of Case Management [Director].

3. The required services outlined in the IEP are not in dispute. The District did not dispute Student requires curb to curb transportation as a related service and this is plainly stated in the IEP. District Ex. 9.

4. The issues here are twofold, but both arise from an incident which the parties agree occurred on April 1, 2022. On that day, Student and another student were in the self-contained classroom, and the other student bit Student on the cheek. Testimony of AP. Evidence of the severity of the bite varied significantly. In a text message to Parent, the special education teacher stated that another

student "tried" to bite Student. District Ex. 14. In other messages and emails, the bite was described both as breaking, and not breaking the skin, being three bites instead of one, and drawing blood. District Ex. 16.

5. The testimony establishes that, however severe the bite was, the special education teacher did not request first aid for the student, nor did the special education teacher immediately notify administration at ES1. Testimony of AP. Instead, Parent called the school upon receiving the initial text message and requested the school nurse provide first aid. The nurse was apparently out that day, but the nurse's assistant treated the injury with disinfectant. Testimony of AP.

6. In addition, the special education teacher took photos of the injury and texted them to Parent. Color copies of the photos are provided in the record. District Ex. 16. The photos are not of high enough quality for the Hearing Officer to definitively say how severe the injury was.

7. The most credible testimony regarding the bite came from the nurse's assistant, who provided first aid to Student after the bite. Testimony of Nurse's Assistant [FASA]. According to the FASA, the bite did penetrate the skin, and was significant enough that the FASA recommended the parents seek follow-up medical care. Student never returned to the classroom. Testimony of Parent.

Instead, Student was taken to a medical doctor by the father, and was prescribed a course of antibiotics as documented in Parent Exhibit 3. Parent testified that Student also received a test for bloodborne diseases, and must take a follow up test six months after the bite. In short, strong evidence supports a finding that the bite penetrated the skin and that the special education teacher's description of the bite as either attempted or insignificant was in error.

8. Testimony established that the student who perpetrated the biting had a history of biting which was known to both the District and the special education teacher. Testimony of Special Education Instructional Facilitator [SEIF]. This witness further stated he saw Student after the incident and Student's cheek was red. The witness also stated he spoke with Parent the day of the incident, which was a Friday, and informed Parent that he'd have a meeting and put a plan into place to prevent future issues on the following Monday. Testimony of SEIF.

9. On the Monday, April 4, 2022, the staff meeting did occur at ES1. The meeting involved various administration at ES1 as well as the special education teacher and classroom aides. Testimony of SEIF, AP. A plan was formulated at the meeting to ensure the safety of all students in the classroom, specifically revolving around the addition of one or more adult staff members to help supervise the

room. Testimony of AP. According to SEIF, the purpose of additional staff was specifically to "shadow" the student who did the biting to ensure the safety of all students. However, the meeting also covered the use of positive supports to encourage appropriate behaviors, such as keeping one's hands and mouth to one's self. Testimony of AP.

10. Testimony credibly established that, although Student never returned to ES1, the "safety plan" instituted after the biting incident worked in as much as there were no further biting incidents in the classroom the rest of that school year. Testimony of [SEIF]. Testimony from the SEIF was notably credible based on demeanor and strong working recollection of the facts including multiple interactions with Parent. This includes testimony that the special education teacher was aware the biting student had bitten before, and, that students with a known history of biting should be watched closer. Testimony of SEIF.

11. It is undisputed that Student's father picked Student up from school April 1, 2022, and Student thereafter never returned to ES1. According to SEIF, he had a conversation with Parent on April 6, 2022 to let Parent know about the safety meeting and additional measures that would be taken to protect all students in the classroom. Parent was not in agreement with the plan, but the plan was ready for

immediate implementation. Testimony of SEIF. Both SEIF and AP testified that in their experience, the plan was sufficient to ensure that all students in that classroom would receive a free appropriate public education.

12. Student was in fact absent from school from the time Student left ES1 on April 1, 2022 until Student's first day at ES2 which was May 3, 2022. Several relevant events occurred between those dates.

13. The parties seem to dispute the timing and frequency of contacts. Parent insists she contacted District employees continuously from the date of the incident. Other than conversations with the school set forth above, the primary administrative contact person insisted that no conversation took place with parent until April 26, 2022. Testimony of Student Services Division Coordinator [SEC]. See also Testimony of Director, Case Management Department [Director]. It is noted spring break was the week of April 11, so no students received instruction at that time. District Ex. 1. There is at least one record of possible contact with Parent dated April 19, 2022. District Ex. 18. Overall, there's nothing about the timing of contacts throughout April that particularly suggests fault with either party.

14. What is known is that on April 26, 2022, Director spoke with Parent about what was styled as a request by Parent to change schools. According to

Director, Student was fully authorized to return to ES1, but Parent had continued safety concerns and did not want to return student to ES1. As a result, the District agreed to a change of schools to ES2. According to the District, this was a voluntary change by Parent and so, pursuant to District policy, Parent was responsible to provide transportation. ES1 was some five miles from Parent's house, whereas ES2 was 10.5 miles from Parent's house. Testimony of Director. Parent testified that the distance from her house to ES2 is 15.7 miles one way, confirmed by Google Maps. It is therefore established the distance was actually 15.7 miles.

15. Parent testified to the concerns that led her to want to change schools. These were primarily that the special education teacher downplayed the severity of the incident, that the special education teacher permitted roughhousing between Student and the biting student prior to the incident, that the special education room was understaffed, that the special education teacher failed to request first aid for Student, and that the special education teacher allegedly did not read the biting student's IEP. Testimony of Parent. Due to the unavailability of the former special education teacher, some of these allegations cannot be evaluated. But the parent's concerns are generally supported by substantial evidence, in that testimony established the room was understaffed (at least

pursuant to the individual school's preference or custom and not any formal policy), the incident was inaccurately described by at least the special education teacher, and first aid was not immediately requested by the special education teacher. Testimony of AP, Principal.

16. As a result, a transfer request was completed on April 26, 2022. District Exhibit 17. Though it reflects the Student withdrew on April 1, 2022, that was merely the last day Student attended ES1. Student was free to return to ES1 between those dates, or anytime. Testimony of Principal. Once the form was submitted and transfer setup, Student's first day of instruction at ES2 was May 3, 2022. Student received no instruction between April 2, 2022 and May 2, 2022. Testimony of Parent.

17. The other half of this matter concerns the events regarding transportation to ES2. It is undisputed Student's IEP calls for curb to curb transportation, ten times a week, and undisputed that Student received that transportation while attending ES1. District Ex. 9.

18. As explained by the [SEC], it is the District's policy that if a voluntary change of schools is made during the school year, responsibility for transportation falls to the student/parent. According to the witness, the parent chose to change

school and as such, was responsible for transportation. Testimony of SEC. The witness was not sure if this policy was written down anywhere. The witness informed Parent of this policy verbally, but despite Parent's request, no written version of the policy was ever provided to Parent. Testimony of Parent.

19. The District presented testimony from a Transportation Operations Coordinator [TO] that again verified that transportation is placed on the parent and student if the student transfers to some school other than the "home" school, meaning, the closest one to their home that has whatever program the student requires. According to Director, no process exists in the District to provide transportation in such a circumstance. But TO testified that the transportation department could have arranged transportation to ES2 for Student had it been asked, but no such request was ever made by administration. It is established that Parent repeatedly requested transportation to ES2 in her communications with various administrative personnel. Testimony of Parent. See also District Ex. 18.

20. TO also provided illumination as to the genesis of this policy, citing Regulation R-5112. The regulation does indeed say, in relevant part, "Transportation will not be provided for students who attend school as a result of a Change of School Assignment." District Ex. 21. But, as Parent wisely pointed out

on cross-examination, the policy also by its own terms applies to students "in Grades Kindergarten through 12…" and Student at the time was in the District's Pre-K program. TO confirmed the regulation makes no mention of Pre-K.

21. TO was asked directly how to reconcile a policy that purportedly shifts the burden of transportation to a student with an IEP that requires the District to provide transportation. The witness explained the issue was primarily cost-based. Though the witness also explained changes to special education transportation may affect other students, such as by adding a stop on a route, the department was capable of making those route adjustments. Testimony of TO.

22. Parent transported Student to and from ES2 from May 3, 2022 to May 25, 2022 which was the last day of the school year and Student's last time attending ES2. That covers 17 instructional days. Student then started summer school at yet a different school altogether, followed by extended school year "ESY" schooling at a different school still. Although Parent drove Student to summer school and ESY at times, the District did provide transportation to those locations as well. Student started the current school year on August 8, 2022 at a new school (ES3), and the District provides transportation to that school as well. Testimony of Parent.

23. A couple tertiary points bear mention as they reflect on the overall decision. The District chose to present the assistant principal at ES1 as a witness, which left Parent to call Principal as her witness. It is apparent why after hearing from both witnesses. The Principal's testimony was not particularly useful given his significant lack of ability to remember any details about the biting incident or the school's response thereto. Principal stated he did not believe the special education teacher did anything wrong or should have done anything differently, but AP testified to several criticisms of the special education teacher. See testimony of AP, also, District Ex. 16 (emails, on which Principal is copied). In short, given Principal's evasiveness and lack of memory, Parent's concerns about the safety of Student at ES1 were justified.

24. A second issue emerged during the due process hearing. It has always been known, as documented throughout the Hearing Officer Exhibits, that the special education teacher was no longer employed by the District. No party was able to locate the teacher, so, an order was entered explaining that hearsay about things the teacher may have said would be permitted (noting that such evidence is generally allowed anyway). Hearing Officer Ex. 11. The same order instructed the District to make various witnesses available at the Due Process Hearing,

including the classroom aide who was present in the classroom when the bite occurred.

25. Despite knowing of the need for the classroom aide as a witness since at least August 23, 2022, the District allowed the due process hearing to proceed without mentioning until the second day of the hearing (September 27) that the aide's last day of employment with the district was September 26 – in effect, standing by silently and allowing the witness to become unavailable. There needs to be no mistake: This type of gamesmanship has no place in IDEA hearings. In this case, there is ample evidence to establish what happened in the classroom despite the lack of any eyewitness to the biting incident. Any party interfering with the orderly presentation of witnesses may rest assured every possible negative inference will be drawn against the party. *LaJoices v. City of N. Las Vegas*, 2011 U.S. Dist. LEXIS 49046 (D. Nev. April 28, 2011) (Trier of fact may conclude "evidence made unavailable by a party was unfavorable to that party").

26. Parent provided limited testimony regarding remedies. Parent requested compensatory education for time missed, taken to refer to the month delay in leaving ES1 and starting at ES2. Parent also requested reimbursement for transporting Student to ES2. Parent did not particularly detail the amount of either

remedy sought, but did contend various employment opportunities were missed as a result of having to transport Student to school.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusions of Law of this Hearing Officer are as follows:

Basic requirements of the IDEA:

Under the Individuals with Disabilities Education Act ("IDEA"), public schools are required to provide children with disabilities with a "free appropriate public education" ("FAPE") by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program ("IEP") that is developed according to the IDEA's procedures. 20 U.S.C. §1401(9); 34 C.F.R. §300.17.

The United States Supreme Court has twice addressed the substantive standard of the IDEA in the provision of FAPE, first in *Board of Education v. Rowley*, 458 U.S. 176 (1982) and much more recently in *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017). The basic requirements of the act, and especially those relevant to the procedural requirements of the act, have remained the same since *Rowley*.

> "[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g. 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP…demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."

Rowley, 458 U.S. at 205-206.

To meet its substantive obligations under the IDEA, the District must offer an individualized educational program developed through the Act's procedures "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S.Ct. at 999. Notably, the IEP must be reasonable – there is no requirement that it provide what is best or ideal. Id.

The issues under consideration in this case are very narrow, and first ask whether a denial of FAPE occurred due to safety issues at ES1. The second issue then examines whether a denial of FAPE occurred when the District declined to provide transportation to ES2.

After consideration of the evidence, the District's safety plan and offer of continued delivery of services at ES1 provided a FAPE. As a result, there was no denial of FAPE for the time Student was absent from ES1.

Parent has stated a credible and convincing case that the conduct of staff at ES1 fell below the applicable standard of care and probably was the cause of Student's injury. But this isn't a negligence action, and there is in fact applicable and binding authority that must be applied to the facts of this case. On doing so, it is unclear how the single incident here, while certainly traumatic to Parent, could somehow arise to a denial of FAPE under the IDEA.

According to the Ninth Circuit, "[I]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE." *M.L. v. Fed. Way Sch. Dist.,* 394 F.3d 634, 650 (9th Cir. 2005). In that case, the parent removed the student from the school after mere days of enrollment, which the Court noted failed to give the district a reasonable opportunity to prevent harm from other students. *Id*. at 651. The case did not apparently involve physical harm, but there is no logical reason to apply a different test in light of the strong language used in the case. *Id*. at 650-51, *citing Davis v. Monroe County Bd. Of Educ*., 526 U.S. 629 (1999). Moreover, at least one other

court has found that a hearing officer correctly rejected a claim that systemic bullying that included physical abuse resulted in a denial of FAPE. *SS. v. District of Columbia*, 68 F. Supp. 3d 1 (U.S.D.C. 2014).

Deliberate indifference requires conscious choice to follow a particular course of action. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Whether the special education teacher was deliberately indifferent to Student's safety is a close call, but even if it was assumed Parent met this requirement, the rest of the analysis strongly favors the District. *M.L. v. Fed. Way Sch. Dist.,* 394 F.3d at 650 (applying deliberate indifference standard to determine loss of educational opportunity under the IDEA).

That is to say, the abuse was not "so" severe that Student could derive "no" benefit from special education services. Parent's feelings towards the incident aside, it was but a single incident, and unfortunately, biting is something that happens in self-contained classrooms at that age. Testimony of AP. Moreover, it's impossible to accept Parent's characterizations of the biter as "violent." We are talking about three and four year old developmentally disabled students. There is zero basis to conclude the actions of the biting student were malicious, or that they were beyond remedy such as through positive reinforcement. The biting student's

behaviors are, in fact, the exact behaviors the "kids" program is designed to eliminate by way of positive reinforcement of positive behaviors. Testimony of AP.

A single biting incident that resulted in minor injury falls far short of the type of unrelenting abuse that would be required to eliminate Student's ability to benefit from special education at ES1. This is all the more true given the safety plan that was implemented. While the classroom was short of the school's goal of a teacher and two aides, it met the requirement of having a teacher and one aide. NAC 388.150. The safety plan added even more personnel to the classroom, and alerted all involved to both watch the biting student closer and address that student's behavior through reinforcement.

Could the school have done better? Obviously. But that's negligence, which isn't the standard for a denial of a free appropriate public education. Student could have received a free appropriate public education had Student attended ES1 between April 2, 2022 and May 2, 2022. Student (through Parent) chose not to, but because the District's offer of special education services through that time was reasonably calculated to provide Student a FAPE, there was no denial of FAPE for that time period and thus no basis to award compensatory education or any other relief.

Parent is entitled to reimbursement for transportation expenses because the District failed to provide FAPE when it declined to provide transportation services set forth in the IEP.

As clear as the first issue is, the second is equally so except in the Parent's favor. The District has failed to meet its burden of proof that it was relieved of providing transportation due to the Parent's decision to change schools.

It was never disputed that the IEP requires transportation as a related service. Parent never repudiated that requirement. Testimony of Parent. Also, the record is silent as to any prior written notice, or anything in writing at all, wherein Parent agreed to provide transportation against the mandate of the IEP. There just is no evidence of any change or revision to the IEP whatsoever, much less concerning transportation.

At most, the District pointed to a regulation that appeared to so require. But as Parent pointed out, that regulation by its own terms does not apply to Pre-K education. There's simply no basis to read into the regulation something that it does not say. Basic contractual interpretation in fact says to not do that; requiring construction against the party that drafted the term in question. *Anvui, LLC v. G.L. Dragon, LLC,* 123 Nev. 213, 163 P.3d 405 (2007). The District obviously has many

capable attorneys and could easily have drafted the regulation to include Pre-K, if it wanted to.

There's serious doubt though that even if the regulation covered Pre-K, that it would override the specific requirements of the IEP. The District can have all the regulations it wants. The IEP still required curb to curb transportation and that requirement was never modified in writing. 34 C.F.R. 300.324(b). The District could have declined the transfer of schools, or could have required a revision to the IEP as a condition of the transfer, but neither of those things happened. What's more, the District not only agreed to the change of schools, it provided transportation to various schools over the summer, and it provides transportation to Student's current school.

As a result, the District's offer of education that included parent-provided transportation was contrary to the requirements of the IEP and a substantive violation of the IDEA. That is so because to provide a FAPE, the District must provide special education and related services in conformity with the IEP, and the IEP here plainly required transportation as a related service. 20 U.S.C. §1401(9)(D). The implementation failure here was substantial, in that if Student

was not transported to school, Student would receive no educational benefits at all. *Van Duyn v. Baker Sch. Dist.,* 502 F.3d 811, 822 (9th Cir. 2007).

The remedy in similar cases where transportation is not provided and a resultant substantive violation occurred seems to be reimbursement for mileage using the applicable IRS rate. *A.S. v. Harrison Twp. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 57008 (D.N.J. April 29, 2016) (error to award anything other than IRS rate, such as lost time or wages, because IDEA hearing officer may only award costs, not damages), *citing Ruby v. Jefferson City Bd. of Educ.*, 122 F. Supp. 3d 1288 (N.D. Ala. 2015). Although Parent's claim of lost employment opportunities is credible, these authorities constrain recovery here to the IRS mileage rate, and no other more-generous authority was cited by the parties or located by this Hearing Officer.

As a result, judicial notice is taken of the IRS milage rate for the first half of 2022, which was 58.5 cents per mile. *M.M. v. Lafayette Sch. Dist.*, 2016 U.S. Dist. LEXIS 98196 (N.D. Cal. July 27, 2016) (IRS mileage rate appropriate judicially noticed because it is not subject to reasonable dispute). The round trip was 15.7 miles times two, which is 31.4 miles, and Parent made that round trip seventeen times. Therefore, the District must reimburse Parent $533.80. Because Parent did transport Student to school, and although Parent was apparently tardy a handful

of times, Student had near-perfect attendance at ES2 and no award of compensatory education is required because no educational opportunity was meaningfully lost.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

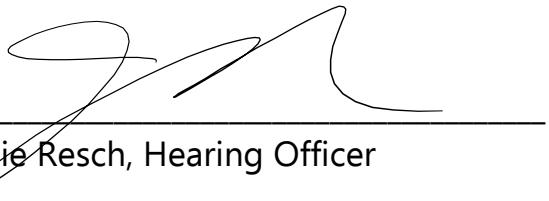
No later than October 30, 2022, the District will:

1) Reimburse Parent the costs of transportation to ES2 by paying Parent $533.80.

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this decision pursuant to NAC §388.315. A party to the hearing may file a cross-appeal within ten (10) days after receiving notice of the initial appeal. If there is an appeal, a state review officer appointed by the Superintendent from a list of officers maintained by the Department shall conduct an impartial review of the hearing pursuant to NAC 388.315.

Dated: October 7, 2022



Jamie Resch, Hearing Officer

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