This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

ODR File Number

26100-21-22

CLOSED HEARING

Child's Name:

C.R.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

07/22/2022

Introduction

This special education due process hearing concerns a student with disabilities (the Student). The Student's parents (the Parents) requested this hearing, alleging that the Student's public school district (the District) violated the Student's educational rights.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*., and their federal and Pennsylvania implementing regulations. There is no dispute that the Student is a child with a disability or that the District is the Student's Local Educational Agency (LEA) as those terms are defined by the IDEA.

The Student is a young child whose disabilities result in serious behavioral problems. Both parties agree that the Student's behaviors are a function of the Student's disabilities.

The Parents allege that the District violated both the Student's rights and their own rights in several ways, starting on March 13, 2020, when the District was ordered to close in response to COVID-19. When the District closed, it provided asynchronous remote instruction. The Parents claim that the District violated the Student's right to a free appropriate public education (FAPE) while the Student received asynchronous remote instruction. This period of time extended through the start of the 2020-21 school year.

During the 2020-21 school year, the District shifted to hybrid instruction, described below. In lieu of hybrid instruction, the District also permitted all families to continue remote instruction, which was no longer completely asynchronous. The Parents chose for the Student to continue remote instruction. The Parents claim that the District continued to violate the Student's right to a FAPE while the Student received remote instruction.

At the start of the 2021-22 school year, the District shifted again to in-person instruction. The Student returned to the Student's neighborhood elementary school at this time and was educated there until April 26, 2022. The Parents agree that, in general, the Student received a FAPE during this period of time. However, the Student was subject to several out-of-school suspensions. The Parents argue that those suspensions violated the Student's right to a FAPE.

On April 26, 2022, the Student engaged in a serious behavioral incident. As a result of that incident, the District removed the Student from the neighborhood elementary school and placed the Student in a 45-day Interim

Alternative Educational Setting (IAES). Both parties filed due process complaints shortly thereafter. I consolidated the complaints, bifurcated issues concerning the Student's removal, and resolved those issues on the IDEA's expedited timeline. The expedited decision and order are found at ODR # 26436-2122 & 26467-2122 (consolidated). The Expedited Decision speaks for itself but, for context, I found that the Student's actions resulted in serious bodily injury to District personnel and the District was permitted to remove the Student to the IAES for not more than 45 school days. A copy of the Expedited Decision is attached to this decision as Appendix A.

The District has also proposed a change in the Student's placement. The proposed placement effectively maintains the IAES as the Student's special education placement. The Parents claim that the proposed placement, if implemented, would violate the Student's right to be educated in the least restrictive environment (LRE) and, therefore, would violate the Student's right to a FAPE. They demand an IEP that would return the Student to the neighborhood elementary school with increased supports.

In addition to the above, the Parents claim that the District violated their IDEA right to meaningfully participate in the development of the Student's IEPs. The Parents also bring discrimination and retaliation claims.

Discussed below, I find in part for the Parents and in part for the District.

Procedural History

The somewhat-complex procedural history of this matter from its inception through May 26, 2022, is included in the Expedited Decision. The procedural history after the Expedited Decision is not remarkable. Additional hearing sessions convened, and the parties filed written closing briefs in lieu of oral closings statements.

Issues

The parties parse the issues somewhat differently, but those differences are semantic, not substantive. *See* NT 354-356, 369-375.[1] The issues before me are:

[1] This section of the transcript also includes remarks concerning my jurisdiction to hear discrimination and retaliation claims that do not arise under 22 Pa Code § 15 (Chapter 15). That issue is addressed below.

1. During the period from March 2020 through the end of the 2020-21 school year, did the District violate the Student's right to a FAPE while the Student received various forms of remote instruction?

2. During the period from the start of the 2020-21 school year through the Student's placement in the IAES, did the District violate the Student's right to a FAPE while the Student received out-of-school suspensions?

3. Must the District offer an IEP that returns the Student to the Student's neighborhood elementary school for the 2022-23 school year with sufficient supplementary aides and services to enable the Student to derive a FAPE in that location?

4. Did the District violate the Parents' right to meaningfully patriciate in the IEP development process for the Student?

5. Did the District discriminate against the Student on the basis of the Student's disability and did the District retaliate against the Student or the Parents?

Findings of Fact

The Expedited Decision includes 56 findings of fact. Those findings are hereby incorporated by reference. *See* Appendix A. Some of those findings are, however, repeated or summarized herein for context and flow. To resolve any ambiguity, additional facts begin with number 57.

I reviewed the record in its entirety. I make findings only as necessary to resolve the issues before me. I find as follows:

The 2019-20 School Year through March 13, 2020[2]

57. The 2019-20 school year was the Student's [redacted] year.

58. During the 2019-20 school year, the District conduced an educational reevaluation of the Student and, on December 16, 2019, issued a reevaluation report (the 2019 RR). The District found the Student

[2] There is some ambiguity as to whether the Parents claims start two years before the date of the filing (February 16, 2020) or when school closed on (March 13, 2020). I look to the Parents' closing brief to resolve that ambiguity. There, the Parents demand for compensatory education starts in March 2020, and so I address the period from the start of the 2019-20 school year through March 13, 2020 to provide background and context.

eligible for special education under the disability categories Specific Learning Disability (SLD) and Other Health Impairment (OHI). S-4

59. At the time of the 2019 RR, the District considered whether the Student met criteria for Emotional Disturbance as well. The Multidisciplinary Team did not make that finding because there was no history of significant negative behaviors. *Id.*

60. On January 21, 2020, the Student's IEP team revised the Student's IEP. The IEP included a Positive Behavior Support Plan (PBSP). S-5. By this point in time, the Student's in-school behaviors were becoming problematic.

61. On February 26, 2020, the Student's IEP team met again to revise the IEP in response to the Student's behavioral issues. S-44; NT 658-661.

March 13, 2020 through the End of the 2019-20 School Year

62. I take judicial notice that, on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19 pandemic. On April 9, 2020, that order was extended through the end of the 2019-20 school year.

63. The District closed in compliance with the Governor's order and provided asynchronous online instruction for the remainder of the 2019-20 school year. NT 566, 661-662. In this context, asynchronous means that the District made instructional materials available to the Student online, but generally did not provide direct instruction by teachers through video teleconferencing or other means.

64. During this time, the Student's case manager (the Case Manger) provided live check-ins with the Student. The Case Manager was also available to the Student via phone, email, and video conference. NT 540, 566-567, 570; S-7.

65. During this time, the District offered Speech supports via videoconference and asynchronous lessons. The Student attended 6 out of 7 videoconferences but completed none of the asynchronous lessons. S-7.

66. Sometime shortly after June 12, 2020, the District issued a Distance Learning Progress Report for the Student. Regarding the Student's IEP goals, the District wrote only that "due to the Covid-19 school closures

resulting from the pandemic, reporting on [Student's] goals were not possible." S-7.

The 2020-21 School Year

67. The 2020-21 school year was the Student's [redacted] year.

68. The District provided asynchronous online instruction at the start of the 2020-21 school year, then shifted to hybrid instruction. During hybrid instruction, the District provided two days per week of in-person instruction at school, two days per week of synchronous instruction online, and one day per week of asynchronous instruction online. NT 572, 663. In this context, synchronous instruction means that the District provided direct remote instruction via videoconference or similar means.

69. When the District shifted to hybrid instruction, it allowed all families to choose between hybrid instruction and fully remote instruction for the remainder of the 2020-21 school year. The Parents chose the fully remote option, and the Student received a combination of synchronous and asynchronous instruction for the entire 2020-21 school year. NT 572-574.

70. During the 2020-21 school year, the Case Manager continued to check in with the Student weekly and provided daily check-ins as well during what would otherwise be the Case Manager's lunch break. The Case Manager used some of this time to provide additional math support to the Student and the Student's peers. NT 422-423, 580-583, 661-662; S-13.

71. The Student also had check-ins with the school's Emotional Support teacher during this time. S-13.

72. During remote instruction, the Student would occasionally turn off the camera or microphone but was otherwise engaged in remote instruction. *See, e.g.* NT 579-58.

73. The Student started the 2020-21 school year under an IEP issued on January 7, 2020. S-5. Except for a speech articulation goal, all goals in that IEP targeted the Student's behaviors. *Id*.

74. On January 11, 2021, the Student's IEP team reconvened to draft the Student's annual IEP. At that time, the Student was academically successful in online instruction. According to teachers, the Student was

engaged in the synchronous part of that instruction and did not exhibit problematic behaviors while participating in online instruction. NT 581-583, 663; S-8, S-12.

75. At the same time, however, the IEP team continued to include behavioral goals and self-regulation strategies in the Student's IEP, targeting both inappropriate and disruptive verbal behaviors and physical aggression. S-8.

76. The District did not monitor the Student's behavioral goals while the Student participated in remote instruction (both before and after the January 2021 IEP was in place). *See, e.g.* S-11

77. During the January 11, 2021, IEP team meeting, the Parent expressed concerns about the Student's transition back to in-person instruction at the start of the 2021-22 school year. NT 663, 808-809.

The 2021-22 School Year

78. The 2021-22 school year was the Student's [redacted] year.

79. The Student's suspensions during the 2021-22 school year are discussed in Appendix A, below. For context, the Student was suspended 11 times during the 2021-22 school year. *See, e.g.* FF 29.

80. Facts comprising a general overview of the 2021-22 school year, facts concerning the Student's behaviors during the 2021-22 school year (including a significant behavioral incident on April 26, 2022), and facts concerning the District's removal of the Student to a 45-day IAES are found at FF# 1-56 in Appendix A. See above regarding the incorporation of the prior expedited decision.

81. Concerning FF# 21, on June 3, 2022, I toured the Student's [redacted] classroom and surrounding area. The description of that classroom and area is accurate, but the tour was quite helpful.[3] Drawings of that area

[3] Although it does not impact upon the outcome of the case, seeing the unusual classroom configuration enabled me to visualize more easily some of the difficult problems posed by this case. In the Student's neighborhood elementary school, multiple [redacted] classrooms are contained in one, very large, square room with no internal walls. Within that room, teachers have built improvised walls made of bookshelves, lockers, easels and the like. None of these come close to reaching the ceiling, sound travels through all of them, and it is easy to understand how every [redacted] classroom would know what is happening in every other [redacted] classroom.

created by the Student's [redacted] teacher during her testimony are in evidence as H-1 and H-2.

82. Facts concerning the level of behavioral support that the Student received starting in October 2021, and how that behavioral support increased to two-to-one (2:1) PCA support with a PBSP and several other behavioral interventions are presented in Appendix A.

83. The Student's [previous year] teacher, [current] teacher, and Case Manager met to discuss the Student's transition to in-person instruction before the start of the 2021-22 school year. NT 391, 419-421, 900-901.

84. From the start of the 2021-22 school, the Student's behaviors were unpredictable and disrupted the class daily. The [redacted] teacher moved the Student through five different seating groups to find an optimal peer group and configuration for the Student. The Student was physically aggressive to other students in each of these groups. The Student was consistently physically aggressive to one other student regardless of the seating configuration. The Student was also physically aggressive to the [redacted] teacher on at least three occasions during the 2021-22 school year. NT 385, 407, 445-446, 454-460.

85. In addition to the facts in Appendix A, the District convened an IEP team meeting on September 21, 2021, to discuss the Student's increasing behaviors. *See, e.g.* S-13. During that meeting, the Parents asked to end in-school social skills instruction. NT 449, 585. The District issued a NOREP to end social skills instruction, but the Parents did not sign that document. Instead, the IEP team agreed that the Student would continue to receive social skills instruction and additional in-school counseling provided by a third party. This continued throughout the 2021-22 school year. *See* S-14, S-15, S-17, S-27, S-34.

86. On September 30, 2021, the IEP team met again and agreed that a Functional Behavioral Analysis (FBA) was necessary. S-17.

87. On October 6, 2021, the Parents provided consent for the District to communicate with the Student's private therapist but revoked that consent shortly thereafter. Instead, the Parents shared some information from the Student's private therapist but did not permit direct communication. S-19, NT 696, 850-851.

88. On October 20, 2021, the IEP team met again to discuss the Student's increasing behaviors. The FBA approved around September 30, 2021, was not yet complete. By this point in time, the Student had a "private office" – a desk and materials in a sectioned off area of a storage room adjacent to the Student's classroom – that the Student could use to deescalate and work alone. *See* S-27.

89. The District completed the FBA and convened another IEP team meeting on November 21, 2021, to discuss the results, the Student's behaviors, and revisions to the IEP. The IEP team increased the amount of third-party in-school counseling and provide a 2nd PCA. S-27. *See also* Appendix A.

90. I previously found that the Student is not able to generalize behavioral regulation skills, that the Student's behaviors were not improving, and that behavioral charting indicating a decrease in behaviors indicated an increased ability of District personnel to "catch" the Student's behaviors before they were charted. *See* Appendix A. Evidence concerning the Student's behaviors during the 2021-22 school year that was presented after the expedited portion of this matter concluded was consistent with that finding.

91. Starting in January 2022, the District began to recommend an Emotional Support (ES) placement for the Student. The District formally offered a supplemental ES placement for the Student on January 24, 2022. *See* Appendix A. *See also* NT 448-449; S-17, S-34.

92. The Parents rejected (and continue to reject) the Districts' ES placement offer. *Passim*.

93. The District does not have a [redacted] emotional support classroom in the Student's neighborhood elementary school. The proposed ES placement was in one of the District's other elementary schools. NT 258, 587-588.

94. The District removed the Student to a 45-day IAES after a significant behavioral incident on April 26, 2022. This is discussed in Appendix A.

95. The 45-day IAES essentially is the ES placement that the District proposed on January 24, 2022. *See, e.g.* S-34, S-57.

96. While attending the ES placement, the District continued to chart the Student's behaviors and used a class-wide behavior monitoring system as well. S-60. That data shows that the Student continues to exhibit

many of the troubling behaviors that the Student exhibited in the neighborhood elementary school. *Id*.

97. Data concerning the Student's negative behaviors in the ES placement shows inconsistent improvement, but improvement none the less. *Id*. The Student continues to have difficult days. *See, e.g.* S-60 at 74. But, increasingly, these are outliers – particularly regarding the Student's physical behaviors. *See* S-60 as a whole. This is in no way intended to diminish the seriousness of the Student's verbal behaviors, which disrupt the Student's education and that of others, and are alarming, upsetting to staff and peers, and potentially dangerous in their own way. *Id*.

98. The ES placement features a lower student-to-staff ratio as compared to the Student's neighborhood elementary school, daily social skills using a research-based curriculum, and greater access both to emotional supports and personnel trained to implement those supports. *See* S-57 at 22.

99. After the Student's transfer to the 45-day IAES / ES placement, the District reevaluated the Student with the Parents' consent. After a compressive review of existing information, the multidisciplinary team determined that additional information was needed. The team conducted additional testing on May 11, 18 and 26, 2022.

100. On May 26, 2022, I issued the final decision and order included here in Appendix A.

101. On May 31, 2022, the District finalized and issued its reevaluation report (the 2022 RR). S-57.

102. The 2022 RR included a comprehensive battery intelligence and academic tests and behavioral ratings scales (both broad and targeted). *Id*.

103. Through the 2022 RR, the District found that the Student continued to be eligible for special education, but under the primary disability category of Emotional Disturbance and the secondary category of OHI. *Id*.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make

"express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the [WHAT] is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful

educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ*., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate

progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Least Restrictive Environment (LRE)

The IDEA requires LEAs to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). That continuum must include "instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1); *see also* 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each student can receive FAPE. *See* 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. *See id*.

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit held that LEAs must determine whether a student can receive a FAPE by adding supplementary aids and services to less restrictive placements. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more restrictive placement. Even then, the LEA must ensure that the student has as much access to non-disabled peers as possible. *Id* at 1215-1218.

More specifically, the court articulated three factors to consider when judging the appropriateness of a restrictive placement offer:

"First, the court should look at the steps that the school has taken to try to include the child in a regular classroom." Here, the court or hearing officer should consider what supplementary aids and services were already tried. *Oberti v. Bd. of Educ*., 995 F.2d 1204, 1216 (3d Cir. 1993)

"A second factor courts should consider in determining whether a child with disabilities can be included in a regular classroom is the comparison

between the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom. The court will have to rely heavily in this regard on the testimony of educational experts." The court cautioned, however, that the expectation of a child making grater progress in a segregated classroom is not determinative. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216-1217 (3d Cir. 1993).

"A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom." The court explained that a child's disruptive behavior may have such a negative impact upon the learning of others that removal is warranted. Moreover, the court reasoned that disruptive behaviors also impact upon the child's own learning. Even so, the court again cautioned that this factor is directly related to the provision of supplementary aids and services. In essence, the court instructs that hearing officers must consider what the LEA did or did not do (or could or could not do) to curb the child's behavior in less restrictive environments. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3d Cir. 1993)

There is no tension between the FAPE and LRE mandates. There may be a multitude of potentially appropriate placements for any student. The IDEA requires LEAs to place students in the least restrictive of all potentially appropriate placements. There is no requirement for an LEA to place a student into an inappropriate placement simply because it is less restrictive. However, LEAs must consider whether a less restrictive but inappropriate placement can be rendered appropriate through the provision of supplementary aids and services.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory

education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court concluded that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* remains the leading case on this method of calculating compensatory education.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also embraced the *Reid* method in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* to explaine that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the *Reid* or "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014).

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for

each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist*., 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014). S*ee also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence establishing the position that the student would be in but for the denial, or evidence establishing the amount and type of compensatory education needed for remediation, the hour-for-hour approach is a necessary default. Alternatively, full-day compensatory education can also be an appropriate remedy if the full-day standard is met. In all cases, however, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

This matter breaks into discrete periods of time. The Parents raise different claims and demand different remedies for some of those periods. I will address those periods in order.

March 13, 2020, through the End of the 2019-20 School Year

The record includes preponderant evidence that the District did not implement the Student's IEP and did not collect progress data from the day

that it was ordered to close through the end of the 2019-20 school year. Nothing in the record establishes that the Student suffered an academic loss as a result, but the Parents are correct that the term "education" goes well-beyond academics.[4] Applied to this case, there is no dispute that the Student's IEP in place when the District closed was appropriate. I find, therefore, that implementation of the Student's IEP was necessary for the Student's receipt of a FAPE. Such implementation did not happen, and so the Student is owed compensatory education.

Examined out of context, an obvious question may be: what else could the District have done? In context, there are good answers to that question. The United States Department of education under two administrations has consistently held that COVID-19 school closures in no way abrogate the rights of children with disabilities. The Pennsylvania Department of Education (PDE) has consistently reached the same conclusion. However, PDE has also recognized that, through no fault of their own, LEAs may violate children's rights by complying with school closure orders. In response to this dilemma, PDE formulated a procedure by which LEAs could determine Students are entitled to COVID Compensatory Services (CCS) when instruction resumed. In this way, LEAs could remediate losses of educational benefits by providing compensatory education-like services.

In this case, the District did not determine if the Student was entitled to CCS and did not offer CCS.[5] I find that the District had an opportunity to remediate the Student's loss of educational benefit for the period from March 13, 2020, through the end of the 2019-20 school year and took no action.

To remedy the complete loss of non-Speech IEP benefits from March 13, 2020, through the end of the 2019-20 school year, I award full days of compensatory education for each day that the District would have been open but for the COVID-19 school closure order. This compensatory education is subject to the terms and conditions set forth below.

[4] Above, I explain this principle in the context of *Endrew F., supra*. In their closing brief, the Parents properly cite to several other cases in support of this assertion: *M.C. v. Central Regional School Dist*., 81 F.3d 389, 393-94 (3d Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181-82 (3d Cir. 1988*); Kruelle v. New Castle County School Dist*., 642 F.2d 687, 693 (3d Cir. 1981); *D.S. v. Bayonne Bd. of Educ*., 602 F.3d 553, 557 (3d Cir. 2010); *G.D. v. Wissahickon Sch. Dist.*, 832 F.Supp.2d 455, 467 (E.D. Pa. 2011).

[5] The compensatory education offered through NOREPs referenced in Appendix A were conditional and were not related to violations occurring during mandatory COVID-19 school closures.

The 2020-21 School Year

The District continued to violate the Student's right to a FAPE throughout the 2020-21 school year. The District made the option to continue remote instruction available to the Parents, and so the District cannot raise the Parents' choice as a defense. After offering the Parents the option to continue remote instruction, it was the District's obligation to provide a FAPE in the modality that the Parents chose. The District did not do that. Instead, the District continued with a series of IEPs that focused on the Student's behaviors. These IEPs included goals that could not be monitored from afar and made little sense in the context of remote instruction.

Before the January 2021 IEP team meeting, the continuation of pre-COVID behavioral goals into remote instruction in the 2020-21 school year could be an oversight. The District's offer of an IEP with similar goals in the middle of a remote school year is baffling. Further, there is no evidence in the record that the District implemented the Student's IEPs with fidelity during the 2020-21 school year, no evidence of measurable progress monitoring (*see, e.g.* S-11), and no evidence that the Student received a meaningful benefit from the IEP during this school year.

There is no dispute that the Student is a child with a disability and entitled to a FAPE, which flows from the IEP. There is no evidence that the Student received a FAPE from an IEP at any time during the 2020-21 school year. In contrast, there is evidence that an IEP that was not designed for remote instruction followed the Student into the 2020-21 school year and that the District made no effort to meaningfully change that IEP – even when opportunities like the January 2021 IEP team meeting presented themselves.

To remedy the loss benefits during the 2020-21 school year, I award full days of compensatory education for each day that the District was in session. This compensatory education is subject to the terms and conditions set forth below.

The 2021-22 School Year through April 26, 2022

The Parents seek compensatory education only for some of the Student's out-of-school suspensions during the 2021-22 school year through the behavioral incident on April 26, 2022. I will not, therefore, evaluate the overall appropriateness of the Student's program during this period.

The Parents allege that the Student's suspensions during the 2021-22 school year violated the Student's right to a FAPE. The Parents argue that the District's tracking of the Student's suspensions do not reflect the days that

they had to pick the Student up early from school, or days that the Student spent most of the day isolated from peers, both resulting from the Student's behaviors. Even discounting those numbers, the Parents count more than 15 days of suspension, more than the 11 that I counted in Appendix A, below.

Below, I relied upon S-39 (a Student Infraction Report) and S-40 (a report from Sapphire, the District's student information system). I accept the statement in the Parents' closing brief concerning the number of the Student's suspensions as if it were a motion for reconsideration and, upon reexamination of the record, I must agree with the Parents. S-39 itself reflects 19 days of out-of-school suspension through April 19, 2022, not including the days that the Parents were called to pick up the Student early because of the Student's behaviors.

Under both the IDEA and Pennsylvanian's implementing regulations, these out-of-school suspensions constitute an impermissible change in the Student's placement. Out-of-school suspensions constitute a change in placement when they occur for 10 consecutive school days or constitute an impermissible pattern of removals. 34 C.F.R. § 300.536(a). Pennsylvania regulations enhance and simplify the federal definition of a pattern of removals by defining a pattern as "a disciplinary exclusion of a student with a disability for more than 15 cumulative school days in a school year… ." 22 Pa. Code § 14.134(a).

I appreciate that the District continually increased the Student's behavioral supports throughout the 2021-22 school year. However, after 15 cumulative days of out-of-school suspension, suspension was no longer a permissible method of behavioral intervention. Each of those days, by law, constitutes an impermissible change the Student's placement. During each of those days, the District did not implement the Student's IEP. This constitutes a violation of the Student's right to a FAPE.

I award the Student a full day of compensatory education for each day that the District suspended the Student out of school beyond the 15th cumulative day of out-of-school suspension until April 26, 2022. This compensatory education is subject to the terms and conditions set forth below.

Placement

Evidence in this case overwhelming supports the District's conclusion that the Student is a child with an Emotional Disturbance as that term is defined by the IDEA. *See* 34 C.F.R. § 300.8(c)(4). Evidence in this case also overwhelmingly supports the District's conclusion that the Student requires Emotional Support services in order to derive a meaningful educational

benefit from the District's programming. Every fact found above and below supports this conclusion.

The record also supports a find that the District failed to systematically consider what supplementary aides and services would enable the Student to receive Emotional Support while remaining in the Student's neighborhood elementary school. The District did not use tools and supports for LEAs promulgated by PDE, such as the SAS Toolkit, to enable this conversation during IEP team meetings. The absence of the SAS Toolkit by itself does not support an *Oberti* violation. Rather, the District's predetermination that the Student can only receive Emotional Support in an Emotional Support classroom does.

Emotional Support is a service, not a physical location. The evidence in this case establishes that the District uses a centers-based approach in which Emotional Support services are housed outside of the Student's neighborhood elementary school. The District has no obligation to make all of its special education services available in each of its buildings. *See, e.g. Lebron v. N. Penn Sch. Dist*., 769 F. Supp. 2d 788 (E.D. Pa. 2011). Similarly, the District has broad discretion in building selection if the Student cannot receive a FAPE in the neighborhood elementary school. *See id*. Neither of these factors, however, excuse the District from a serious, deliberate conversation within an IEP team meeting to determine whether the Student could receive appropriate Emotional Support in the Student's neighborhood elementary school.[6] The record as a whole supports a finding that this failure is a result of a combination of District personnel thinking of Emotional Support as a place, and District personnel's lack of familiarity with the tools available to assist the analysis required by *Oberti*, which has been the law of the land for nearly 30 years.

Within the unique context of this case, however, I find that these failures are procedural in nature. While the District failed to have a conversation that the IDEA requires, evidence is preponderant that the Student requires a level of Emotional Support that is not available at the Student's neighborhood elementary school. The District's proposal to change the Student's placement to the school building in which necessary services are located is, therefore, procedurally flawed but substantively appropriate.

To move forward, the parties shall meet at an IEP team meeting as soon as possible, but before the start of the 2022-23 school year. The District shall bring a draft IEP to that meeting, and that draft shall include the level of

[6] I also agree with the Parents that District personnel's lack of understanding about what supplementary aides and services is quite concerning.

Emotional Support that the Student received in the 45-day IAES. The IEP team shall discuss whether the same level of Emotional Support can be provided in the Student's neighborhood elementary school. The IEP team shall also discuss what goals, program modifications, specially designed instruction, and related services the Student requires to receive a FAPE.

After this IEP team meeting (as soon as possible, but before the start of the 2022-23 school year), the District shall propose an IEP for the 2022-23 school year with a NOREP for the Parents to either approve or reject the recommendation.[7]

Parental Participation

Above, I found that the District took an approach to IEP development in which it considered an Emotional Support classroom to be the only place in which Emotional Support can be delivered. This is a form of predetermination that violates the Parents' right to meaningfully participate in IEP development. *See, e.g. Montgomery Cnty. Intermediate Unit No. 23 v. A.F.,* 506 F.Supp.3d 293, 309 (E.D. Pa. 2020) (*quoting D.B. ex rel. H.B. v. Gloucester Twp. Sch. Dist*., 751 F.Supp. 2d 764, 776 n.15 (D.N.J. 2010)*, aff'd sub nom. D.B. v. Gloucester Twp. Sch. Dist*., 489 F. App'x 564 (3d Cir. 2012).

For the same reasons as set forth above, I find that the District's predetermination is a procedural error, not a substantive violation. That does not prohibit me from ordering the District to comply with the IDEA's procedures. My order regarding IEP development for the 2022-23 school year requires the District to comply with the IDEA's requirement for meaningful parental participation.

Retaliation and Discrimination

The Parents' retaliation and discrimination claims exceed the scope of my jurisdiction and are denied on that basis.

In Pennsylvania, ODR hearing officers have jurisdiction to hear certain IDEA claims and certain Section 504 claims.[8] The Parents' retaliation and discrimination claims arise under Section 504. I have found in previous hearings that I had jurisdiction to hear these claims. I believe that the

[7] I appreciate that an extraordinarily difficult pendency issue may arise if the Parents reject the next proposed IEP. Resolving the Student's pendent placement should a future dispute arise would be an advisory opinion on an issue that may never arise. I feel it is necessary, however, to note my concern and urge the parties to proceed with caution.
[8] ODR also has jurisdiction to hear gifted education dispute arising under 22 Pa. Code § 16.

United States Supreme Court's holding in *Fry v. Napoleon Cmty. Sch*., 137 S. Ct. 743 (2017) changes the analysis. That analysis must begin with the source and scope of my IDEA jurisdiction.

I. Source and Scope of IDEA Jurisdiction

The source my authority to hear IDEA claims is Pennsylvania's IDEA implementing regulations at 22 Pa. Code § 14 (Chapter 14).[9] Comparing the scope of the IDEA to the scope of Chapter 14 reveals that I have jurisdiction to hear only a sub-set of all possible IDEA claims.

The primary function of the IDEA is to ensure that all students who satisfy the IDEA's definition of a "child with a disability" receive a free appropriate public education (FAPE). *See* 20 U.S.C. §§ 1400, 1401 (regarding purposes and definitions, respectively). To do this, the IDEA provides federal money to the states in exchange for compliance. *See, e.g.* 20 U.S.C. § 1403 (regarding abrogation of sovereign immunity). Unsurprisingly, the IDEA includes several rules about how that money is used and the conditions under which funds are distributed. *See, e.g.* 20 U.S.C. § 1412, 1413 (regarding state and local education agency eligibility). These provisions come in addition to the substantive and procedural obligations placed on LEAs, which have primary responsibility for the provision of a FAPE. *See, e.g.* 20 U.S.C. §§ 1414, 1415 (regarding substantive and procedural rights and obligations, and the administrative dispute resolution process).

There are a host of potential IDEA violations that have nothing to do with a child's receipt of a FAPE. For example, misappropriation of IDEA funds violates the IDEA even if that misappropriation has no substantive or procedural impact on an individual child's special education. The IDEA says little about who can bring such non-FAPE claims. More importantly, nothing in the IDEA, or any Pennsylvania regulation, or any court case gives me authority to hear non-FAPE IDEA claims.

In contrast, the IDEA explicitly gives parents standing to request hearings on behalf of their children when the dispute concerns the provision of a FAPE. *See* 20 U.S.C. § 1415(b)(6)(A); *see also Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516, 127 S. Ct. 1994 (2007). The IDEA also explicitly gives hearing officers authority to resolve both procedural and substantive FAPE claims. 20 U.S.C. § 1415(f)(2)(E). Chapter 14 adopts the IDEA's federal implementing regulations concerning the substantive and procedural rights

[9] Chapter 14 applies to Pennsylvania's public school districts and early intervention agencies. The source of ODR's authority to hear IDEA cases against Pennsylvania's public charter schools is 22 Pa. Code § 711.

to a FAPE, including due process rights. *See* 22 Pa. Code § 14.102. From that starting point, Chapter 14 clarifies my duties when resolving IDEA FAPE claims. 22 Pa. Code § 14.162.

My authority under Chapter 14 to hear and resolve FAPE disputes is broad, but Chapter 14 provides no authority for me to resolve non-FAPE disputes. Through Chapter 14, the Pennsylvania Department of Education "contracts" with ODR to provide for "coordination services for hearings *related to a child with a disability or thought to be a child with a disability.*" 22 Pa. Code § 14.162(p)(1) (italics added). Therefore, of all the potential disputes that could arise under the IDEA, I may only adjudicate disputes directly concerning the rights of individual children with disabilities. In this way, Chapter 14 sets the boundaries of my IDEA jurisdiction.

II. Source and Scope of Section 504 Jurisdiction

Section 504 is a broad law in comparison to the IDEA. Although there are some exceptions, the IDEA only protects children who have any of the IDEA's qualifying educational disabilities and, by reason thereof, need special education and related services. 20 U.S.C. § 1401(3).[10] A significantly broader set of children have disabilities but do not need special education. Those children are not protected by the IDEA but are protected by Section 504.

Section 504 protects all "handicapped persons," as defined at 34 CFR § 104.3(j)(1):

> Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

This definition is not limited to a list of disability categories and is not related to a person's age or status as a student. Similarly, Section 504 prohibits disability-based discrimination in a broad array of programs and activities that include, but are not limited to, schools. 24 CFR § 104.3(k). The scope of potential claims under Section 504, therefore, extends well beyond educational matters. The types of Section 504 claims that I may adjudicate are, however, limited through the same mechanism that limits my IDEA jurisdiction.

[10] Exceptions include disciplinary protections for children who have not yet been found eligibly for special education, and the so-called "Child Find" obligation that requires schools to identify students who may need special education. *See, e.g.* 20 U.S.C. § 1415(k)(5).

The source of my authority to hear Section 504 claims is Pennsylvania's Section 504 implementing regulations, 22 Pa. Code § 15 (Chapter 15). Just as Chapter 14 sets the boundaries of my IDEA jurisdiction, Chapter 15 sets the boundaries of my Section 504 jurisdiction.

Chapter 15 implements Section 504 for students in schools by prohibiting disability-based discrimination against children who are "protected handicapped students." Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and

2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and

3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Chapter 15 prohibits schools from denying protected handicapped students participation in, or the benefit of, regular (as opposed to special) education. Chapter 15 accomplishes this by requiring schools to provide "those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa. Code § 15.3. This is accomplished through a Service Agreement, which is a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student."[11]

Chapter 15, therefore, applies to a narrow sub-set of all people protected by Section 504. Similarly, Chapter 15 concerns a narrow sub-set of rights in comparison to the broad "program or activity" provisions of Section 504. Those rights all relate to the aids, services, or accommodations that are necessary for protected handicapped students to participate in school programs, and the procedural mechanisms by which those rights are

[11] When a student is a child with a disability for IDEA purposes, the service agreement is subsumed by the IEP, and compliance with the IDEA evidences compliance with Section 504.

guaranteed. Those rights, taken collectively, are sometimes referred to FAPE under Section 504 or a Section 504 FAPE. The concept of a FAPE under Section 504 has been recognized by the Third Circuit. *See, e.g. Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999).

III. Jurisdictional Analysis

Of all the possible IDEA claims, my authority is limited to claims arising under Chapter 14. Of all the possible Section 504 claims, my authority is limited claims arising under Chapter 15. The question, therefore, is whether the Parents' discrimination and retaliation claims arise under Chapter 15. To answer that question, I look first to Chapter 15 itself.

Discussed above, Chapter 15 concerns the regular education accommodations that a protected student needs to access a school's programs. Chapter 15 also concerns the procedural mechanisms by which schools and parents secure those accommodations. Said differently, Chapter 15 is about the development, content, and implementation of Section 504 service agreements, and an individual student's entitlement thereto. The Parents' discrimination and retaliation claims falls beyond that scope.

At the same time, I must acknowledge that presenting the Parents' discrimination and retaliation claims in this hearing was their safest course of action. The IDEA has an administrative exhaustion requirement that obligates parents to exhaust IDEA remedies before bringing FAPE claims in court. 20 U.S.C. § 1415(l). Historically, cases like *Batchelor v. Rose Tree Media School Dist.*, 759 F.3d 266 (3d Cir. 2014) imply that anything educational in nature must pass through a due process hearing on its way to court. A small number of Pennsylvania due process decisions include findings of deliberate indifference and the like. However, more recent cases illustrate that a special education due process hearing is not always a prerequisite to a lawsuit in court, and that the IDEA's exhaustion requirement does not expand the scope of my Section 504 jurisdiction.

In 2017, the United States Supreme Court considered the IDEA's exhaustion requirement in *Fry v. Napoleon Cmty. Sch.,* 137 S. Ct. 743 (2017). In *Fry*, the Court held that the parents of a child with disabilities need not exhaust IDEA administrative remedies before bringing a Section 504 claim in court when the "gravamen of the … suit is something other than" a FAPE claim. *Fry v. Napoleon Cmty. Sch*., 137 S. Ct. 743, 748 (2017). However, parents cannot subvert the IDEA's exhaustion requirement by presenting IDEA claims in the guise of Section 504 claims through artful pleadings. *Id* at 755.

Writing for a nearly unanimous Court,[12] Justice Kagan illustrated a method to discern the gravamen:

> One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.
>
> Take two contrasting examples. Suppose first that a wheelchair-bound child sues his school for discrimination under Title II (again, without mentioning the denial of a FAPE) because the building lacks access ramps. In some sense, that architectural feature has educational consequences, and a different lawsuit might have alleged that it violates the IDEA: After all, if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-world) success. But is the denial of a FAPE really the gravamen of the plaintiff's Title II complaint? Consider that the child could file the same basic complaint if a municipal library or theater had no ramps. And similarly, an employee or visitor could bring a mostly identical complaint against the school. That the claim can stay the same in those alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education.
>
> But suppose next that a student with a learning disability sues his school under Title II for failing to provide remedial tutoring in

[12] Justice Alito filed an opinion concurring in part and concurring in the judgement. Justice Thomas jointed that concurrence.

> mathematics. That suit, too, might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation; the complaint might make no reference at all to a FAPE or an IEP. But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial? The difficulty of transplanting the complaint to those other contexts suggests that its essence—even though not its wording—is the provision of a FAPE, thus bringing [IDEA administrative exhaustion] into play.

Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 756-57 (2017).

The *Fry* hypotheticals are used by courts to determine whether a Section 504 claim is truly a discrimination claim that can go directly to court, or an "artfully pleaded" FAPE claim that is subject to administrative exhaustion. I must recognize the weirdness of applying these principles at the due process level. Doing so, however, helps resolve my jurisdiction.

The *Fry* hypotheticals suggest that that the discrimination and retaliation claims in this case are not FAPE claims and, therefore, are not the type of claims that I can adjudicate. For example, the Student could have brought the same claims against a public theater or library. If a public library denied the Student participation in its programs because the Student has a disability, the library has certainly discriminated against the Student – but not in any way that is related to the Student's educational rights in general or right to a FAPE specifically. If the Student then tried to enforce the Student's rights and the library retaliated, the result is the same.

I recognize that a portion of the Parents' Section 504 claims are educational in nature. The educational components of their Section 504 claims are subsumed by their IDEA claims. In special education cases, LEAs demonstrate compliance with educational Section 504 through compliance with the IDEA. Children who are eligible for special education under the IDEA receive an IEP. They do not receive a separate Service Agreement as well. I do not pretend that there is a bright line separating the Parents' educational and non-educational Section 504 claims. I find, however, that to whatever extent the Parents' Section 504 claims are educational, they are subsumed by their IDEA claims. To whatever extent the Parents' section 504 claims are not educational, they are beyond my jurisdiction. The discrimination and retaliation claims fall into the latter category.

The Parents' discrimination and retaliation claims are not the artful pleadings that concerned the Court in *Fry*. Those issues fall outside of my jurisdiction for the same reasons that they are not subject to IDEA administrative exhaustion.

Chapter 15 contemplates this situation. Chapter 15 incorporates several parts of Chapter 14, some of which relate back to the IDEA's exhaustion requirement. However, Chapter 15 also excludes Section 504 non-FAPE claims from administrative exhaustion. 22 Pa. Code § 15.10. "A student filing a claim of discrimination need not exhaust the procedures in this chapter prior to initiating a court action under Section 504." *Id*. The Parents' discrimination and retaliation claims fits squarely into that exception.

Summary and Legal Conclusions

The District violated the Student's right to a FAPE from March 13, 2020, through the end of the 2019-20 school year. During this time, the District did not implement the Student's IEP. I award full days of compensatory education for each day that the District would have been open but for the COVID-19 school closure order.

The District violated the Student's right to a FAPE during the entirety of the 2020-21 school year. During this time, except for some Speech therapy, the District did not implement the Student's IEP. To remedy the loss benefits during the 2020-21 school year, I award full days of compensatory education for each day that the District was in session.

The District violated the Student's right to a FAPE during each out-of-school suspension beyond the 15th day of out of school during the 2021-22 school year before April 26, 2022. Each of those suspensions was an impermissible change in the Student's placement by operation of law. I award one full day of compensatory education for each such out-of-school suspension.

All compensatory education awarded herein is subject to the following terms and conditions:

All compensatory education awarded herein is subject to the following conditions and limitations. The Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in

addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

The District violated the Student's procedural rights when proposing to change the Student's placement to an Emotional Support placement outside of the Student's neighborhood elementary school. The District also violated the Parents' rights to meaningfully participate in IEP development through the same actions. Under the unique facts of this case, those violations were procedural, not substantive in nature. No remedy is awarded for those violations.

To resolve the Student's placement going forward, Student requires the amount of Emotional Support services that the District recommends. The Student's IEP team must, however, determine if those services can be provided in the Student's neighborhood elementary school. To date, the Student's IEP team has not addressed that question with the seriousness that the IDEA requires. The District is not, however, obligated to recreate its entire Emotional Support program inside of the Student's neighborhood elementary school. The necessary IEP development process for the 2022-23 school year is discussed further, above.

Finally, the District's discrimination and retaliation claims fall beyond my jurisdiction and are dismissed on that basis.

ORDER

Now, July 22, 2022, it is hereby **ORDERED** as follows:

1. To remedy the District's violation of the Student's right to a FAPE from March 13, 2020, through the end of the 2019-20 school year, the Student is awarded full days of compensatory education for each day that the District would have been open but for the COVID-19 school closure order.

2. To remedy the District's violation of the Student's right to a FAPE during the entirety of the 2020-21 school year, the Student is awarded full days of compensatory education for each day that the District was in session.

3. To remedy the District's violation the Student's right to a FAPE during each out-of-school suspension beyond the 15th day of out of school during the 2021-22 school year before April 26, 2022, the Student is awarded one full day of compensatory education for each such out-of-school suspension.
4. All compensatory education awarded herein is subject to the terms and conditions set forth in the accompanying Due Process Decision.

5. The District violated the Student and Parents' procedural rights while proposing to change the Student's placement to an Emotional Support placement outside of the Student's neighborhood school. These procedural violations did not result in substantive harm, and no additional remedy is awarded.

6. The parties shall follow the procedures described in the accompanying Due Process Decision to draft an IEP for the Student for the 2022-23 school year and shall complete that process as soon as possible but before the 2022-23 school year starts.

7. The Parents' discrimination and retaliation claims are dismissed for lack of jurisdiction.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

Appendix A

In re: C.R., a Student in the Bensalem Township School District
ODR Nos. 26436-2122 & 26467-2122 (consolidated)
Issued May 26, 2022

This expedited decision and order is presented without a cover page that was included in the original, and with page numbering and footnote numbering that flows from the decision and order for ODR No. 26100-2122. The parties to this matter have original copies of this consolidated, expedited matter, and a redacted copy with original pagination will be posted in accordance with ODR's practices.

Introduction

This special education due process hearing concerns an elementary school-aged student (the Student). The Student is a "child with a disability" as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The Student's parents (the Parents) and the Student's public school district (the District) disagree about several issues. Those disagreements have resulted in three due process complaints. The issues in two of those complaints must be heard on the IDEA's expedited timeline. This due process hearing resolves the expedited issues presented across the parties' complaints.

The expedited issues focus on an incident during which the Student injured District personnel. Both parties agree that the Student's behavior during the incident was a manifestation of the Student's disabilities. However, the District concluded that it was not safe to maintain the Student's placement and proposed a change in placement. The Parents rejected the District's offer, and so the District requested an expedited due process hearing to move the Student to a 45-day Interim Alternative Educational Setting (IAES). The Parents dispute the District's conclusion that maintaining the Student's placement was unsafe for the Student or for others.

Shortly after requesting an expedited hearing, the District learned more about the injuries, concluded that the injuries meet the definition of "serious bodily injury" (SBI), and moved the Student into a 45-day IAES on that basis (a different basis; distinct from the safety issue raised in the District's expedited complaint). When this happened, the Parents filed their own expedited due process complaint. The Parents take the position that the injuries are not SBIs and demand an order requiring the District to return the Student to the Student's prior placement, which is in the Student's

neighborhood elementary school. The Parents also demand compensatory education and declaratory relief.

Discussed below, I find that the injuries to one of the District's employees meet the definition of SBI and find in favor of the District on that basis. However, I must acknowledge that question of whether those injuries constitute SBI is a very close call. For that reason, I go on to consider the substantial likelihood of injury to the Student or others if the District had maintained the Student's pre-IAES placement. I find that there was a substantial likelihood of injury and, therefore, the District can move the Student to a 45-day IAES even if the injuries to one of the District's employees was not SBI.

Procedural History

This procedural history is an abbreviated version of the entire procedural history of this case, highlighting the procedural events before this hearing.

On February 16, 2022, the Parents requested a due process hearing by filing a due process complaint. The ODR file number for the Parents' original complaint is 26100-21-22. The Parents were *pro se* at that time. By March 16, 2022, the Parents had retained counsel sought leave to amend their complaint.

On March 21, 2022, the Parents filed their first amended due process complaint (now via counsel).

The behavioral incident in which the Student injured District personnel occurred on April 26, 2022.

On April 27, 2022, the District requested a due process hearing by filing its own expedited due process complaint. The ODR file number for the District's expedited complaint is 26436-21-22The District's claims and demands are discussed below. This decision and order resolves ODR No. 26436-21-22 in its entirety.

The District concluded that the injuries to its personnel satisfy the definition of SBI and proposed to change the Student's placement on April 29, 2022.

On May 3, 2022, the Parents filed a second due process complaint, which also is expedited. The ODR file number for the Parents' expedited complaint is 26467-21-22. The Parents' claims and demands are discussed below. This decision and order resolves ODR No. 26467-21-22 in its entirety.

On May 10, 2022, the Parents amended their original due process compliant for a second time. In the body of the amendment, the Parents waived the IDEA's dispute resolution period in writing. The District promised an identical waiver with its answer on the record during the hearing session on May 16, 2022. Those waivers enabled all three matters to proceed on a consolidated record. As applied, this means that the evidence presented in the parties' expedited due process hearing need not be presented again in the non-expedited hearing.

This decision and order is the final administrative order for the parties expedited due process complaints.

Issues

The parties phrase and parse the issues differently, and do not agree about what language I should use to describe the issues. Those disputes are semantic, not substantive.

The District presented one issue in its expedited due process complaint: Is it substantially likely that maintaining the Student's pre-IAES placement would result in injury to the Student or to others? The District argues that the answer to this question is "yes" and, therefore, the District may move the Student to a 45-day IAES on this basis. The only relief that the District seeks is an order supporting the Student's placement in a 45-day IAES. The Parents ague the opposite.

The Parents presented one issue in their expedited due process complaint: Were the injuries to District personnel SBI as defined by the IDEA? The Parents argue that the answer to this question is "no" and, therefore, the District may not move the Student to a 45-day IAES on this basis. The Parents demand the Student's immediate return to the pre-IAES placement, declaratory relief, and compensatory education. The District argues the opposite. In fact, as discussed below, the District adopts this issue as its primary argument.

Findings of Fact

The 2021-22 School Year, Generally

1. The Student is an early elementary school-aged child with a disability. For IDEA purposes, the Student's disabilities categories are Other Health Implement (OHI) and Specific Learning Disability (SLD). S-4.

2. At the beginning of the 2021-22 school year, the Student was placed in a [redacted] general education classroom with an itinerant level of support for social and emotional issues at the Student's neighborhood elementary school (counseling services). S-27.

3. The Student also had 1 personal care assistant (PCA), provided by the District. S-27.

4. On October 20, 2021, the District sought the Parents' consent to reevaluate the Student. This was in response to increasing behavioral concerns in school. S-20.

5. On October 25 and 26, 2021, the Parents refused to provide consent for the reevaluation. S-22

6. Although the Parents did not consent to a reevaluation, the District conducted a Functional Behavioral Analysis (FBA) of the Student. S-23. A Board Certified Behavioral Analyst (BCBA) who works for the Intermediate Unit that serves the District conducted the FBA. S-33.

7. October 26, 2021, the BCBA completed the FBA.

8. In late October 2021, the Student's IEP team, including the Parents, added a second PCA to help the Student manage ongoing behavioral issues. S-27.

9. On or about November 17, 2021, the District hired the second PCA. NT 220, 253; *see also* S-30C. I refer to the second PCA as "PCA 2" for the remainder of this decision and order. From this point forward, the Student received two-to-one PCA support in addition to classroom teachers for most hours of every school day. *Passim*.

10. On November 22, 2021, the Student's IEP team convened and developed a Positive Behavior Support Plan (PBSP) for the Student. The IEP team also modified the Student's IEP in response to the Student's ongoing behavioral concerns. S-27. The Parents approved the modifications. S-28.

11. At the same IEP team meeting, the Parents expressed concerns about possible sensory issues and requested an Occupational Therapy (OT) evaluation. S-27, S-28.

12. The District agreed to the OT evaluation. The OT evaluation was conducted by an Occupational Therapist employed by the District's

Intermediate Unit. S-29. While the resulting OT report is not dated, the OT evaluation occurred between December 16, 2021, and January 13, 2022. *Id*.

13. On January 10, 2022, (three days before the OT evaluation was complete) the IEP team reconvened. The District members of the IEP team recommended a change in placement. Specifically, the District recommended that the Student should attend its supplemental Emotional Support program [redacted]. That program is housed in one of the District's elementary schools, but not the Student's neighborhood elementary school. S-34.

14. The District's recommendation for the Emotional Support program was based in large part upon the Student's ongoing behavioral issues, even with two PCAs. *See, e.g.* S-34.

15. The Parents did not immediately agree or disagree with the District's proposal, and the District did not immediately, formally offer that program. *Passim*.

16. The OT Evaluation concluded that the Student had "heightened awareness" in school but a "decreased tolerance" for school, non-preferred activities, and academic tasks that the Student anticipated would be difficult. However, the Occupational Therapist found no sensory issues and, therefore, did not recommend school-based occupational therapy. S-29.

17. On January 24, 2022, the IEP team reconvened to further discuss the District's proposed supplemental Emotional Support (ES) placement. The Parents attended this IEP team meeting with a non-attorney advocate who had assisted the Parents in the past. S-34.

18. The same day, the District issued a Notice of Recommended Educational Placement (NOREP), formally proposing its K-2 supplemental ES program outside of the Student's neighborhood elementary school. S-34.

19. The Parents rejected the NOREP the same day. S-35.

20. On February 16, 2022, the Parents filed their first, non-expedited due process complaint (ODR 26100-21-22). At that time, the operative, last-approved IEP was the November 22, 2021, revised IEP. S-27, S-28.

21. The Student's neighborhood elementary school was built in a "pod" configuration, with few permanent walls between classrooms. As a result, other classes can frequently hear into the Student's classroom. *Passim*.

22. Sometime in February 2022, several other teachers and building-level administrators expressed concern for the Student's teacher's safety. The record does not support a finding as to whether these concerns were raised before or after the Parents requested a due process hearing. *Passim*.

23. Throughout the 2021-22 school year, the District tracked the Student's behaviors on occurrence/non-occurrence sheets in five-minute intervals. Using those sheets, the occurrence or non-occurrence of certain behaviors is marked every five minutes. Multiple occurrences of the same behavior within one five-minute interval result in one tally mark for that interval. *See, e.g.* NT 185-186. *See also* S-30A through S-30H, S-46.

24. To whatever extent the Student exhibited a targeted behavior multiple times in one five-minute interval, the occurrence/non-occurrence sheets underrepresent the Student's total behavioral incidents. *Id*.

25. District personnel, including PCA 2, frequently wrote descriptions of the Student's behaviors and the circumstances surrounding behavioral incidents on the occurrence/non-occurrence sheets. S-30A through S-30H.

26. In broad generalities, the tally marks on the occurrence/non-occurrence sheets show modest improvement over time.[13] However, that improvement is attributable to the intervention of District staff, including the two PCAs, that interrupted the Student's behaviors before they reached a point where the behavior would have "occurred." S-30A through S-30H.

27. The Student's behavioral improvements over time are not attributable to any improved self-control on the Student's part. Rather, the record establishes that the District provided direct instruction in self-regulation methods (which the District describes as coping skills), but the Student has not generalized those skills and does not apply them. *See, e.g.* NT 49, 75-76, 199-200.

[13] The District concedes this point in its closing statement.

28. On April 13, 2022, the Student engaged in a series of behaviors that disrupted the classroom and frightened the other students and adults. The behaviors escalated into physical aggression. Among other things, the Student [engaged in severe disruptive behavior] S-30H, S-38.

29. The District did not suspend the Student because of the April 13, 2022, incident. *Id*. However, between September 20, 2021, and April 19, 2022, the Student accrued 76 behavioral infractions resulting in 11 days of suspension. Not every behavior tracked on the occurrence/non-occurrence sheets counted as a behavioral infraction and not every behavioral infraction resulted in a suspension. S-30A through S-30H, S-39, S-40.

30. The District employs a School Guidance Counselor (the School Counselor) who is assigned to multiple school buildings. The School Counselor provides counseling services and teaches classes. *Passim.*

31. The School Counselor came to the Student's neighborhood elementary school to teach a class as part of her regular schedule after the incident on April 13, 2022. Upon arrival, the school's principal asked the School Counselor to conduct a homicide threat screening of the Student. During that screening, the Student denied any homicidal intent and the School Counselor concluded that there was no credible threat of homicide. S-55.

32. After the screening, the School Counselor and the Student returned to the Students class and the School Counselor started teaching the lesson planned for the day. Shortly thereafter, the Student became disruptive again, this time directing hurtful comments towards a classmate, and was escorted out of the class. When this happened, the School Counselor perceived that the other students were fearful, and the School Counselor abandoned the planned lesson to address the other students' fears. The School Counselor's perception was confirmed when the Student returned to class. The classmate that the Student had targeted moved to distance himself from the Student and the other students grouped around the other student protectively. S-30H, NT 92-97.

33. After April 19, 2022, the Student continued to exhibit behaviors that constituted infractions. At that point, the Student had already accrued 11 suspension days and the District convened Manifestation Determination meetings for any infraction that would ordinarily result

in suspension.[14] The Between March 7 and May 3, 2022, the District convened four Manifestation Determination meetings. S-36, S-37, S-48, S-49.

34. During each Manifestation Determination meeting, the multidisciplinary team concluded that the Student's behaviors were a manifestation of the Student's disability. Contemporaneous documentation from those meetings also underscores the District's belief that it would be in a better position to manage the Student's behaviors while teaching the Student to generalize coping skills had the Parents accepted the proposed, supplementary Emotional Support placement. *See id.*

35. Documentation from the Manifestation Determination meetings accurately reports the Student's behaviors resulting in suspensions through April 19, 2022. Examples of those behaviors include elopement from the classroom and out of the school building, punching other students and staff (sometimes from the front, sometimes from behind, often in the head), spitting on staff, saying that the Student wanted to kill other students and staff, pushing other students into furniture, pulling other students to the ground, and bragging about this conduct. *See, e.g.* S-48.

The April 26, 2022, Incident

36. On April 26, 2022, the Student engaged in a protracted, multi-part behavioral incident that sparked both parties' expedited due process complaints. Every witness who described the incident did so credibly and consistently. Bluntly, there is no real dispute about what happened on April 26, 2022. Rather, the parties reach different conclusions about the legal implications of the incident. My findings come from the testimony of all witnesses to the event taken as a whole, and from S-46, S-53, and S-54:

    a. The incident began when the Student [engaged in disruptive behavior]. Adults who observed this were concerned for several reasons. First, the Student could have harmed other students. Second, the adults could not determine what triggered this behavior.

    b. The Student's behaviors began to escalate [redacted]. Adults escorted the Student to a guidance counselor's office (not the School Counselor's office) to cool down.

[14] *See* 20 U.S.C. § 1415(k)(1)(E) (regarding manifestation determinations).

c. Two adults were present with the Student for the entirety of the incident.

d. While in the guidance counselor's office, the Student rapidly cycled between calm and escalated behaviors. The Student became more escalated with each cycle. This continued for about one hour.

e. During one of the escalations, the Student engaged in unsafe behaviors. PCA 2 and a Behavior Analyst were present at the time and attempted to intervene.

f. At this point, the Student kicked PCA 2 in stomach once or twice. The kick was painful, forcing PCA 2 to leave the room in obvious pain. When PCA 2 left the room, she searched for District employees who are trained to safely restrain children.

g. The Student then slapped and kicked the Behavior Analysist but did not injure the Behavior Analyst.

h. The School Counselor entered the office when PCA 2 left the office. When the School Counselor entered the office, the Student stood on a chair on tiptoes in an effort to take an object on the wall.

i. The School Counselor, fearing that the Student would fall, approached the Student. The Student then swung a closed fist down onto the top of the School Counselor's head, immediately causing pain.

j. The School Counselor then raised her arms above her head defensively. The Student continued to slap at the School Counselor's head until the Behavior Analyst was able to redirect the Student.

The School Counselor's Injuries

37. In the evening of April 26, 2022, the School Counselor experienced an extreme headache ("the worst headache I have ever had") and a sense of fogginess. The School Counselor had difficulty following a recipe that evening and difficulty packing lunch for the next day. NT 60.

38. The School Counselor's pain interrupted her sleep that evening. The pain, which was now behind the School Counselor's eyes as well, and the continued fogginess, prompted the School Counselor to seek medical attention in the morning of April 27, 2022. NT 60-61.

39. Because the School Counselor's injury occurred at work, there was some initial confusion about where the School Counselor needed to go for medical attention. Once that was sorted out, the School Counselor saw a doctor on April 27. The School Counselor was diagnosed with a concussion without loss of consciousness, told to avoid activities that could reaggravate the injury, and placed on light work duty. S-55. The doctor also scheduled a follow up appointment for April 28, 2022.

40. The School Counselor missed work on April 27 and 28, 2022, but did make it to the follow up doctor's appointment. The doctor instructed the School Counselor to avoid strenuous work or anything that required long periods of mental focus. The doctor also limited the School Counselor's screen time to four hours per day. The doctor also placed the School Counselor on light duty through May 7, 2022. *See, e.g.* S-53.

41. Before the concussion, the School Counselor was able to teach several classes in a row. That same work now induces bad headaches, fogginess, or confusion. In addition, the School Counselor has difficulty finding the right words to say during conversations. *See, e.g.* NT 70-71.

42. On May 6, 2022, the School Counselor returned to the doctor. Her symptoms had not improved, and the doctor would make a referral to a neurologist if the symptoms were not improving by May 11, 2022. *See, e.g.* S-53.

43. On May 11, 2022, the intensity of the School Counselor's headaches had improved somewhat, but other symptoms had not. The doctor referred the School Counselor to a neurologist. *See, e.g.* S-53. The neurology appointment is scheduled for May 26, 2022 (the same day that this expedited due process decision is due to the parties).

44. By May 16, 2022, (the day of this hearing), the School Counselor's fogginess had improved, but the School Counselor still experienced headaches, forgetfulness, and difficulty finding words. The School Counselor has taken over-the-counter pain medicine since the day of the injury for the headaches. *See, e.g.* NT 70-71.

PCA 2's Injuries

45. PCA 2 continued to experience pain from the Student's kick throughout the day on April 26 into April 28. PCA 2 did not take time off work because she did not know that she was able to do so.

46. On April 28, 2022, PCA 2 sought medical care. She was diagnosed with an abdominal contusion and placed on light duty through May 9, 2022. *See, e.g.* S-54.

47. PCA 2 was scheduled to return to the doctor on May 8, 2022, to confirm that PCA 2 could come off light duty. Unfortunately, PCA 2 contracted COVID-19 and had to cancel that appointment. S-54.

48. PCA 2's follow-up appointment was unscheduled at the time of the hearing. Further, by May 16, 2022, PCA 2 still experienced abdominal soreness, but her symptoms had improved.

The District's Risk of Injury and Serious Bodily Injury Determinations

49. On April 27, 2022, the District requested an expedited due process hearing (ODR No. 26436-2122-KE). By that point in time, the District determined that maintaining the Student's neighborhood elementary school placement created a substantial likelihood of harm to the Student or to others. *See District's Expedited Complaint.*

50. The District does not propose a typical IAES placement. Rather, the District demanded placement in its [redacted] supplementary ES program for the 45-day IAES. *Passim*.

51. By April 29, 2022, both the School Counselor and PCA 2 had their first medical appointments. The District learned all information about those injuries that was available at that time. Upon considering that information, the District concluded that both the School Counselor and PCA 2's injuries met the definition of SBI.

52. Also on April 29, 2022, after concluding that the injuries were SBI, the District changed the Student's placement to the [redacted] supplementary ES program as a 45-day IAES. *Passim*.

53. Also on April 29, 2022, the District issued two NOREPs. The first NOREP (S-51) explained that the District will not permit the Student to return to the neighborhood high school, pending the outcome of its

own expedited due process complaint. The second NOREP (S-52) placed the Student in the 45-day IAES.

54. The first April 29 NOREP acknowledged that the Student may miss school because of the District's decision to not permit the Student to attend the neighborhood elementary school. Through that NOREP, the District offered full days of compensatory education to remedy any missed days of school. S-51.

55. The second April 29 NOREP also provides full days of compensatory education for each day that the Student attended the 45-day IAES. S-52. However, the compensatory education offered through both NOREPs was contingent upon the Parents accepting the 45-day IAES and not challenging the 45-day IAES placement through a due process hearing. S-51, S-52.

56. On May 3 and 4, 2022, the Parents rejected both NOREPs and, on May 10, 2022, they requested an expedited hearing to challenge the District's SBI determination and seek the Student's return to the neighborhood elementary school.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District,* 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District),* 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist*., No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall

events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

In this case, both parties filed expedited complaints and both parties seek relief, and so the burden of proof is not cut-and-dried. It is the District's burden to prove a substantial likelihood of injury to the Student or others if the Student remained in the pre-IAES placement. It is the Parents' burden to prove that the School Counselor and PCA 2's injuries are not SBI. However, the District's adoption of the Parents' issue as its primary position confounds what might otherwise be a very simple *Schaffer* analysis. I discuss this further in the SBI analysis below.

Discussion

Unilateral Change in Placement – Serious Bodily Injury

The IDEA provides disciplinary protections to children with disabilities that prevent schools from unilaterally changing a student's placement if the disciplinary infraction is manifestation of the child's disability. *See generally,* 20 U.S.C. § 1415(k). However, the IDEA recognizes three special circumstances under which schools "may remove a student to an [IAES] for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(1)(G). Those special circumstances concern weapons, drugs, and SBI. Of those three, only SBI is applicable in this case.

Schools may unilaterally place a child with a disability into a 45-day IAES if the child has "has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency." 20 U.S.C. § 1415(k)(1)(G)(iii).

The IDEA borrows the definition of SBI from federal criminal law. As used in the IDEA, the "term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18." 20 U.S.C. § 1415(k)(7)(D).

As defined by 18 U.S.C. § 1365(h)(3):

> The term "serious bodily injury" means bodily injury which involves—
>
> A. a substantial risk of death;
> B. extreme physical pain;
> C. protracted and obvious disfigurement; or
> D. protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

The definition of SBI uses the term "bodily injury," which is defined at 18 U.S.C. § 1265(h)(4) as follows:

> The term "bodily injury" means:
>
> A. a cut, abrasion, bruise, burn, or disfigurement;
> B. physical pain;
> C. illness;
> D. impairment of the function of a bodily member, organ, or mental faculty;
> E. or any other injury to the body, no matter how temporary.

There can be no dispute that the Student caused a "bodily injury" to the School Counselor and PCA 2. The question is whether either person's "bodily injury" is a SBI as defined by the statute.

Courts and Hearing Officers have considered the circumstances under which injuries do an do not meet the definition of SBI. Both parties rely upon many of these cases and due process decisions. Tracking the parties' arguments is helpful.

The Parents cite to three due process decisions in support of their claim that the School Counselor and PCA 2's injuries do not satisfy the definition of SBI. Of those three cases, the Parents focus on *In re: S.S., a Student in the Pittsburgh Public School District*, ODR No. 18270-16-17 (10/25/2016). In that case, an elementary school student punched a principal several times in the back of the principal's head, causing migraine-like pain. The principal did not suffer a concussion but required a 10-day course of medication and ongoing physical therapy. The question before Hearing Officer Skidmore was whether the principal's pain amounted to an SBI.

Hearing Officer Skidmore reasoned that when the "four categories [of SBI] are read together, it is evident that the physical pain necessary to qualify as a serious bodily injury must be well beyond ordinary and commonplace, and on par with risk of death, significant disfigurement, and protracted impairment of bodily function." *Id* at 9. Hearing Officer Skidmore determined that the principal's pain, although significant, did not amount to a serious bodily injury. *See id*.

When making this determination, Hearing Officer Skidmore noted the differences between "physical pain" which is included in the definition of "bodily injury" and "extreme physical pain" which is included in the definition of SBI. Hearing Officer Skidmore was also mindful of a prior holding from Hearing Officer Myers from a 2008 due process decision (*id* at 11):

> This hearing officer is also mindful of the observation perceptively made by Hearing Officer Myers in *Pocono Mountain School District*, 9430-0809LS, 109 LRP 26432 (Myers, December 12, 2008) at n. 4: "A unilateral [interim alternative educational setting placement] is an extraordinary governmental power that deprives disabled children of the pendency protections usually associated with most other disputed changes in placement [under the IDEA and is] reserved for the most egregious circumstances." Even recognizing as very real the genuine pain and discomfort that the principal experienced … this hearing officer cannot find that the facts in this matter establish such egregious circumstances as to constitute serious bodily injury.

The Parents correctly argue that Hearing Officer Skidmore's analysis is consistent with decisions from other Pennsylvania hearing officers from 2012 and 2014. In *In re: L.V., a Student in the Moon Township Area School District*, ODR No. 13244-1213-KE (12/03/2012), a student injured a teacher to the point that the teacher's skin was broken. The teacher required a tetanus shot. By the time of the hearing, the teacher's wound had healed. The question before Hearing Officer McElligott was whether the teacher's pain constituted serious bodily injury. *See id* at 7. Hearing Officer McElligott concluded that the teacher's pain did not amount to a serious bodily injury for reasons nearly identical to those expressed by Hearing Officer Skidmore (above). *Id* at 7-9.

Similarly, in *In re: D.G., a Student in the Central Dauphin School District,* ODR No. 15648-14-15 (12/21/2014), an elementary school student bit the principal through a suit jacket, kicked the principal in the stomach and legs, and scraped the principal's feet. While none of this broke the skin, the

principal sought medical attention and experienced pain lasting for several days. *Id* at 2-3. As with the prior due process decisions, the question before Hearing Officer Culleton was whether the principal's pain rose to the level of serious bodily injury. For the same reasons as Hearing Officers Skidmore and McElligott, Hearing Officer Culleton also said that the principal's pain was not a serious bodily injury as that term is used in the IDEA. *See id* at 7.

It is striking that the question before Hearing Officers Skidmore, McElligott, and Culleton was whether a particular type or amount of pain was the "extreme physical pain" contemplated in the definition of SBI. Subjectively, both the School Counselor and PCA 2 described their pain as similar to the injured people in the above-referenced due process hearings. Examining the School Counselor and PCA 2's pain in isolation would likely yield a conclusion that their injuries are not SBI. But this case is different – particularly for the School Counselor – because it involves more than pain. Not all the School Counselor's concussion symptoms are physically painful, and cases cited by the District and discussed below suggest that I should examine the injuries in their totality.

The District cites to several due process decisions from other states.[15] While those decisions are well-reasoned, I decline to rely on the out-of-state due process decisions that the District cites to.

In addition to out-of-state due process decisions, the District's argument draws an analogy to a Pennsylvania criminal sentencing statute, 18 Pa.C.S.A. 2301, which includes a definition of "serious bodily injury" that is nearly identical to the federal definition. Under the Pennsylvania statute, a serious bodily injury is an injury which:

1. creates a substantial risk of death;
2. causes serious, permanent disfigurement; or
3. causes protracted loss or impairment of the function of any bodily member or organ.

The differences between the federal and Pennsylvania definitions are that the Pennsylvania definition says nothing about "extreme pain" and does not list "mental faculty" among the functions of bodily members or organs. To the extent that metal faculties are a function of the brain, the clauses concerning "protracted loss or impairment" are substantively identical.

[15] *William S. Hart Union High School District*, 116 LRP 23535 (SEA CAL 5/10/16); *In re: Student with a Disability*, 115 LRP 44815 (SEA NH 12/17/14); *Marysville School District*, 120 LRP 37521 (SEA WA, 3/1/14); *Westminster Sch. Dist.*, 56 IDELR 85 (SEA CAL 2011); *Southfield Pub. Schs.*, 118 LRP 11554 (SEA MI 2/7/18).

When applying this law, Pennsylvania courts and federal courts applying Pennsylvania law have held that concussions do amount to serious bodily injury. *See Commonwealth v. McDowell*, 239 A.3d 43 (Pa. Super. Ct. 2020); *Weathers v. Kauffman*, No. 1:20-cv-1098, 2021 U.S. Dist. LEXIS 12981 (M.D. Pa. Jan. 25, 2021); *Commonwealth v. Fitzgerald*, 220 A.3d 684 (Pa. Super. Ct. 2019). That conclusion, however, is never reached by examining a concussion in isolation.

Commonwealth v. Fitzgerald, supra, provides a good example. In that case, a person identified by the court only as the "Victim" interceded in a bar fight. Fitzgerald then punched the Victim in the face one time, delivering a "knockout" blow. *Id* at 11. As a result of the punch:

> everything went black for [Victim]. [Victim] fell straight back and hit his head on the floor. [Victim] was briefly in and out of consciousness, regaining full consciousness in a hospital room. … [Appellant] was substantially larger than [Victim].
>
> [Victim] testified that he had a concussion, a fractured nose, a sprained neck and a large cut on the back of his head for which he received sutures, that his balance was off for several days leaving him unable to walk, that he wore a neck brace and that he suffered some short term memory loss and loss of coordination. [Victim] was in the hospital for two days and was out of work for three weeks. The medical records demonstrated that [Victim] also suffered from a subarachnoid hemorrhage, frontal lobe contusions, posterior scalp laceration, concussion, cervical sprain and nasal bone fracture. [Victim] received four sutures for the scalp laceration.

Id at 1-2 (bracketed redactions original). The court found that the victims injuries met Pennsylvania's definition of "serious bodily injury." *See id*.[16] However, the court looked at the totality of the victim's injuries; not the concussion or cut or sprain or fracture in isolation. Applied to this case, *Fitzgerald* suggests that I should look at the totality of the School Counselor and PCA 2's injuries, as opposed to any amount of pain or concussion symptoms in isolation.

The same is true for the other cases that the District relies upon. In *Commonwealth v. McDowell, supra*, McDowell drove a truck into an occupied car while fleeing another accident. The person in the car suffered traumatic

[16] The court made this determination in the context of deciding whether Fitzgerald was entitled to a hearing under Pennsylvania's Post Conviction Relief Act.

brain injury, bruised ribs, a bruised collarbone, and a concussion. As a result of those injuries, the person in the car had to attend cognitive brain therapy, was unable to walk or "function correctly" for two weeks, was unable to work for four to five months, could not care for her children for three weeks, and was unable to drive a car for six months. *Id* at 3-4. The court did not scrutinize those injuries in isolation, as if they were separate injuries. Rather, the court examined the injuries as a whole and found SBI.

Similarly, in *Weathers v. Kauffman, supra,* the court held that a jury could conclude that a victim's total injuries amounted to SBI:

> … [The] jury heard testimony about Ms. Shaw being thrown down and having her head pounded against the hood of an automobile and the sidewalk. The assault eventually spilled out into the street which put her at risk of being struck by an automobile in addition to suffering a beating. Mr. Ahmay witnessed the beating and also testified to witnessing [Petitioner] punching and kicking Ms. Shaw. Ms. Shaw was treated at the hospital emergency room due to the assault as she had sustained a broken nose, facial lacerations and bruises as well as a concussion. The overwhelming evidence of record would easily permit the jury to infer that [Petitioner] intended to inflict serious bodily injury to Ms. Shaw.

Id at *31-32. *See also Commonwealth v. Rife*, 454 Pa. 506, 312 A.2d 406, 409 (Pa. 1973) (holding evidence of skull fracture and concussion sufficient to show serious bodily injury); and *Commonwealth v. Cassidy*, 447 Pa. Super. 192, 668 A.2d 1143, 1146 (Pa. Super. 1995) (holding evidence victim had cast put on wrist, wore back brace, and had difficulty moving for two months sufficient to show serious bodily injury).[17]

Taking all the above into consideration, resolving the question of whether the School Counselor or PCA 2 suffered a SBI is an extremely difficult and close call. Both the School Counselor and PCA 2 suffered bodily injuries that no school employee should be expected to endure as part of their jobs. Both experienced real pain, and all concussions should be taken seriously (as that term is colloquially used).

I find that the amount of pain that the School Counselor and PCA 2 experienced, when viewed in isolation, does not constitute SBI. Both the School Counselor and PCA 2 placed their pain at levels similar to the amount

[17] Both cases are cited in *Commonwealth v. McDowell* as additional examples of what constitutes serious bodily injury.

of pain that other Hearing Officers consistently say is not SBI. I agree with my colleagues and conclude that the School Counselor and PCA 2's pain, by itself, is not SBI. For PCA 2, the analysis ends here.[18] PCA 2's injuries do not constitute SBI.

For the School Counselor, however, the total injury includes concussion symptoms that are not just physically painful. The School Counselor's credible testimony, confirmed by contemporaneous documentation, establishes that her mental faculty (i.e. her ability to perform mentally strenuous tasks for a sustained period, her ability to "find" words when speaking) was impaired as a result of the injury.

In comparison to the other three factors in the federal definition of SBI, the loss or impairment of a mental faculty need not be "substantial," "extreme," or "obvious." While this factor must be read in conjunction with the others, the words "loss or impairment" signal that "loss" and "impairment" mean different things, both qualify, and either needs only to be "protracted." There is a good argument, therefore, that the School Counselor's concussion could – by itself – qualify as a "serious bodily injury" if the impairment was "protracted."

I am unaware of any case setting a bright line rule as to what amount of time is "protracted" for SBI purposes. For the various injuries described in the cases above, the duration ranged between a two-day hospitalization and a six-month inability to drive. In all those cases, each victim suffered multiple injuries arising out of a single action, and each of those injuries persisted for different amounts of time. No court looked at the duration of each injury in isolation. Again, the courts looked at the totality of the injury.

In this case, the hearing convened 20 days after the School Counselor's injury. At that time, the School Counselor's post-concussion symptoms were ongoing. Neither party presented preponderant evidence of the expected duration of those symptoms. This absence of evidence is not surprising. At the time of the hearing, the School Counselor did not know if additional testing would be required or whether her symptoms are likely to persist. The IDEA required this hearing to convene before doctors could possibly project the duration of the School Counselor's symptoms.

In its closing brief, the District presents news articles about the medical community's current understanding of concussions and asks me to conclude that concussion symptoms are necessarily protracted by their nature. The

[18] The only SBI factor applicable to PCA 2's injuries is pain. The definition does not consider elements like lost time at work.

District is very likely correct. However, I am bound to resolve this hearing on the record made during the hearing session. No such evidence was presented during the hearing.

The flip side of this coin is: how could such evidence be presented? A concussion is not a broken bone. To the best of my understanding, doctors are in no position to estimate the duration of concussion symptoms at the time of the injury. But this is not the type of fact that can be found through judicial notice.

Technically, through their expedited due process complaint, the Parents are appealing the District's determination that the injuries are SBI, and so it is the Parents' burden to prove that the School Counselor's impairment of a mental faculty is not protracted. The absence of evidence as to anticipated duration could result in a determination that the Parents have not met their burden of proof. However, during the hearing, the District adopted the position that the injuries were SBI, and the District is asking for relief (an order that it may keep the Student in the 45-day IAES). In practice, if not on paper, both parties have advanced this issue, and both seek relief. I resolve this conundrum by looking at all the evidence presented by both parties and determining where the preponderance lies.

A preponderance of evidence yields the conclusion that the School Counselor's injuries, taken in their totality, are similar enough to the fact patterns in which courts have found SBI to conclude that the School Counselor's injuries are SBI. I recognize that the circumstances of those cases and the circumstances of this hearing are not identical. That is to be expected in any analysis that requires me to apply criminal law jurisprudence in a special education hearing.

The Student struck the School Counselor on the head causing pain and a concussion. While the pain, by itself, may not rise to the level of SBI, the pain and concussion symptoms together do rise to that level. Twenty days after the injury, the concussion continued to impair the School Counselor's mental faculty and the School Counselor continued to experience pain. While I cannot conclude how long those symptoms will last, it would be unrealistic for me to take the absence of duration evidence as proof that the concussion symptoms will vanish after this hearing. I examine the totality of the School Counselor's injury, but SBI's definition would be met even if I were to view the concussion in isolation. The School Counselor suffered a protracted impairment of a mental faculty. That is an SBI under 18 U.S.C. § 1365(h)(3)(D).

It does not escape me that it is about a month shy of the Student's [redacted] birthday, and that I am applying definitions from a federal criminal statute that concerns tampering with consumer products. In their closing brief, the Parents say:

> Before delving into the particular facts from the exhibits and testimony, it is noteworthy to consider the District's argument from a zoomed out view: one punch and two kicks from an average sized [early elementary aged student] caused injury on par with a substantial risk of death or protracted and obvious disfigurement. Reason dictates that such a situation would be extremely unlikely.

It is hard to argue with that statement. Even so, congress has taken the definition of SBI from federal criminal law and placed that definition into the IDEA. I am obligated, therefore, to see if the injuries that the Student caused satisfy the definition of SBI regardless of the Student's age or intent.

The District was permitted to move the Student to the 45-day IAES even though the behavioral incident – and, therefore, the injuries as well – were a function of the Student's disability. Hearing Officer Myers is correct that such action is an extraordinary deviation from the IDEA's disciplinary protections, but the removal is permitted by the IDEA at 20 U.S.C. § 1415(k)(1)(G). The Parents, therefore, are not entitled to an order requiring the District to return the Student to the neighborhood elementary school. The Parents are not entitled to compensatory education or declaratory relief as remedies for the Student's removal to the 45-day IAES for the same reasons.[19]

Unilateral Change in Placement – Substantial Likelihood of Injury

Above, I find that the Student injured both PCA 2 and the School Counselor, and that the School Counselor's injuries are SBI. As a result, the District was permitted to move the Student to a 45-day IAES and the Parents are not entitled to relief. Even so, I am compelled to acknowledge the closeness of that call. There are excellent arguments on both sides, and a dearth of cases on point – especially in the context of special education disputes involving elementary school-age children. If I ended my analysis there, an appeal could leave the parties in limbo. Therefore, I go on to resolve the second issue presented in this expedited hearing: is keeping the Student in the pre-IAES placement substantially likely to result in injury to the Student or others?

[19] The Parents assert other bases for compensatory education and declaratory relief in their non-expedited complaint.

If a school district "believes that maintaining the current placement of [a child with disabilities] is substantially likely to result in injury to the child or to others, [it] may request a hearing." 20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a). Such hearings are expedited. *See, id.* At such a hearing, the Hearing Officer may:

> order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

20 U.S.C. § 1415(k)(3)(B)(ii)(II). The District's alternative argument is that, even if I had found no SBI, I should issue such an order.

The same section of the IDEA also enables the Hearing Officer to "return a child with a disability to the placement from which the child was removed[.]" 20 U.S.C. § 1415(k)(3)(B)(ii)(I). The Parents argue that I should return the Student to the pre-IEAS placement on this basis.

I agree with the District. The record in this case overwhelmingly supports the District's determination that maintaining the Student's placement is substantially likely to result in injury to the Student or to others. The record of this case shows a pattern of serious behavioral incidents like the incident in which PCA 2 and the School Counselor were injured. The Student physically strikes school personnel and other students with alarming frequency, considering the Student's 2:1 PCA support. The Student has a history of elopement outside of the building, which is inherently dangerous to the Student. The Student's verbal behaviors are not without risk. In fact, the frequency of such incidents and the District's disciplinary responses thereto are put forth by the Parents as part of their broader claims in their non-expedited complaint.

The record preponderantly establishes that the Student has not learned to generalize the behavior management techniques and coping strategies that the District has taught to the Student, and therefore has little or no ability to self-regulate. The Student engaged in 76 behavioral infractions from September 20 to April 19, 2021. Most of the infractions occurred while the Student was supported by two PCAs. The infractions resulted in 11 days of suspension. Subsequent infractions resulted in four manifestation determinations. These infractions, and the Student's behaviors as a whole (whether or not they were reported as infractions) generated a host of legitimate safety concerns.

Additionally, the District's documentation may have understated the frequency and nature of the Student's behaviors as District staff became more adept at intercepting those behaviors. The fact that school personnel has become better at catching the Student does not mean that the Student's behaviors or ability to self-regulate have improved.

It is impossible to know if the Student would have caused another SBI, but that is irrelevant. The IDEA does not require the substantial likelihood of SBI. Rather, the IDEA requires only the substantial likelihood of "injury." Similarly, it is impossible to know with certainty if the Student or others would have been injured had the District not removed the Student to the 45-day IAES. The IDEA does not require this level of prescience. Only a "substantial" likelihood of injury is required. In this case, the likelihood of injury to the Student or others was substantial at a minimum.

The District has satisfied its burden to prove that maintaining the Student's pre-IAES placement would have been substantially likely to result in injury to the Student or to others. Therefore, even if I determined that the injuries in this case were not SBI, I would have issued an order permitting the District to change the Student's placement to an appropriate IAES for not more than 45 school days.[20] 20 U.S.C. § 1415(k)(3)(A); 20 U.S.C. § 1415(k)(3)(B)(ii)(II).

Summary and Legal Conclusions

The Student engaged in behaviors that are a manifestation of the Student's disability and part of a well-established history of the Student's lack of behavioral control. While engaging in those behaviors, the Student injured the School Counselor and PCA 2.

I find that the School Counselor's injuries are SBI as defined by the IDEA through incorporation of 18 U.S.C. § 1365(h)(3). The District, therefore, was permitted to move the Student to an IAES for not more than 45 school days. The Parents are not entitled to an order requiring the District to return the Student to the Student's neighborhood elementary school for the same

[20] When the SBI "special circumstances" are met, schools may move children with disabilities into a 45-day IEAS. When maintaining a child's placement is substantially likely to result in injury to the child or others, the Hearing Officer may move the child to an *appropriate* 45-day IAES. The word "appropriate" appears when the Hearing Officer orders the change in placement as part of the likely injury provision. The word appropriate does not appear when the District changes the placement after an SBI. *C/f* 20 U.S.C. § 1415(k)(1)(G) ("appropriate" is not used) and 20 U.S.C. § 1415(k)(3)(B)(ii)(II) ("appropriate" is used).

reason. The Parents are not entitled to compensatory education or declaratory relief resulting from the District's removal of the Student from the Student's neighborhood elementary school for the same reason.

My analysis concerning the SBI is difficult and relies upon imperfect analogies to cases that are not precisely on point. In an abundance of caution, and an effort to not leave the parties in limbo, I considered the District's claim that maintaining the Student's prior program would result in the substantial likelihood of injury to the Student or others. The District met its burden. Consequently, even if I had found that the injuries in this hearing are not SBI, I would have issued an order permitting the District to move the Student to an IAES for not more than 45 school days.

An order consistent with the above follows.

ORDER

Now, May 26, 2022, it is hereby **ORDERED** as follows:

1. The injuries that PCA 2 sustained during the Student's behavioral incident on April 26, 2022, are not serious bodily injuries as defined at 18 U.S.C. § 1365(h)(3).

2. The injuries that the School Counselor sustained during the Student's behavioral incident on April 26, 2022, are serious bodily injuries as defined at 18 U.S.C. § 1365(h)(3).

3. The District was permitted to move the Student to an interim alternative education setting for not more than 45 school days pursuant to 20 U.S.C. § 1415(k)(1)(G)(iii).

4. The Parents are not entitled to an order requiring the District to return the Student to the Student's pre-IAES placement or to compensatory education or declaratory relief resulting from the IAES placement.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order, except for claims presented in the Parent's non-expedited due process complaint (ODR 26100-21-22), is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER