*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 Numbers:**
26436-21-22 & 26467-21-22
(consolidated)

**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:**
05/26/2022

## 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 [and] 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 26436-21-22. The District's claims and demands are discussed below. This decision and order resolves ODR [File Number] 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 [File Number] 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 argue 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 [redacted] 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.[1] 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.

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. [redacted]. 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

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

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 Student's 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.[2] 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

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

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 threw water bottles at the backs of other students. 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 after throwing the water bottles. Adults escorted the Student to a guidance counselor's office (not the School Counselor's office) to cool down.

    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 [File Number] 26436-21-22). 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 [elementary] 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 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 [File Number]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 [File Number] 13244-12-13 (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 [File Number] 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.[3] 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 mental faculties are a function of the brain, the clauses concerning "protracted loss or impairment" are substantively identical.

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

[3] *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).

(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 victim's injuries met Pennsylvania's definition of "serious bodily injury." *See id*.[4] 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 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

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

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).[5]

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 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.[6] PCA 2's injuries do not constitute SBI.

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

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

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 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[redacted] grader 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.[7]

### ***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?

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:

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

> 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.[8] 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 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

[8] 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).

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