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

DECISION

Child's Name: S.S.
Date of Birth: [redacted]

CLOSED HEARING
ODR File No. 18270-16-17 AS

Parties to the Hearing:	Representative:
Parent Parent[s]	Parent Attorney Tiffany E. Sizemore-Thompson, Esq. Tribone Center for Clinical Legal Education Duquesne University School of Law 600 Forbes Avenue Pittsburgh, PA 15282
Local Education Agency Pittsburgh Public School District 341 South Bellefield Avenue Pittsburgh, PA 15213-3516	LEA Attorney Aimee Rankin Zundel, Esq. Weiss Burkardt Kramer, LLC 445 Fort Pitt Boulevard, Suite 503 Pittsburgh, PA 15219
Date of Hearing:	October 17, 2016
Date of Decision:	October 25, 2016
Hearing Officer:	Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student in this matter (hereafter Student)[1] is a primary elementary school-aged student in the Pittsburgh Public School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).[2] Student's Parent filed a due process complaint against the District asserting that its notice of a change in placement to an interim alternative educational setting violated specific protections in the IDEA and its implementing regulations.

The case proceeded to an expedited due process hearing concluding in a single session.[3] Both parties presented evidence in support of their respective positions, with the central issue whether the District properly sought a unilateral 45-day interim placement based upon its conclusion that the principal of the elementary school building that Student attended suffered a serious bodily injury due to actions by Student, as permitted by 20 U.S.C. § 1415(k)(1)(G)(iii) and 34 C.F.R. § 300.530(g)(3). The Parent contended that the facts did not rise to the level of the explicit definition of "serious bodily injury" and requested an order that Student return to the home elementary school; the District sought approval of its determination on the 45-day interim placement.

For the reasons set forth below, this hearing officer concludes that the principal did not suffer a serious bodily injury within the meaning of the applicable law and, thus, the District lacked the authority to unilaterally remove Student; but that, nonetheless, maintaining the

[1] In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision, and will be redacted from the cover page prior to posting on the website of the Office for Dispute Resolution.
[2] 20 U.S.C. §§ 1400 – 1482. The implementing federal regulations are found at 34 C.F.R. §§ 300.1 – 300.818, and the state regulations are found at 22 Pa. Code §§ 14.101 – 14.163.
[3] References to record will be to Notes of Testimony (N.T.), School District Exhibits (S-) followed by the exhibit number, and Parent Exhibit (P-) 1. Hearing Officer Exhibit (HO-) 1, an Order that was transmitted to counsel on October 21, 2016 and included various post-hearing communications, is hereby admitted.

placement at the home elementary school presents a substantial likelihood of injury to Student and others. The attached Order will therefore provide for a change in placement for Student to an alternative educational setting.

ISSUE

Whether the injury on September 20, 2016 constituted a serious bodily injury such that the District properly sought a unilateral removal of Student to an alternative educational setting for a period of 45 days?

FINDINGS OF FACT

1. Student is a primary elementary school-aged child who is a resident of the District and was attending second grade in one of its elementary schools during the 2016-17 school year. Student is eligible for special education under applicable federal and state laws. (N.T. 23-24)

2. Student is currently approximately four feet tall and of average size for Student's age.[4] Student is generally nonverbal at school. (N.T. 42-43, 49, 60, 103)

3. The District conducted an evaluation of Student in the spring of 2016 and issued a Reevaluation Report (RR) on April 4, 2016. At that time, Student was already eligible for special education on the basis of a Speech/Language Impairment, but Student had exhibited problematic behaviors at school through kindergarten and first grade (physical aggression toward others and toward property) on almost a daily basis. It was reported in the RR that Student was provided with mental health services at school and had a Crisis Plan to address behaviors. No standardized assessments were administered for the RR because Student did not comply, but behavior rating scales indicated concerns at or near the clinically significant range in many areas. The RR included a determination that Student was eligible for special education on the basis of Emotional Disturbance. (S-1)

4. The District conducted a Functional Behavioral Assessment (FBA) at the end of the 2015-16 school year and planned to conduct another at the start of the 2016-17 school year. Behaviors of concern included physical aggression, non-compliance, and property destruction. The Parent did not provide consent to another FBA in September 2016. (N.T. 164-66; S-5, S-7)

5. Student's Individualized Education Program (IEP), developed in May 2016, was revised in June, July, and August 2016. The IEP as revised provided for annual goals in the area

[4] Counsel for the Parent, with no objection, showed a very brief (13 second) video of Student taken by a surveillance camera in the school building, but the video was not made an exhibit. This hearing officer did view the video (N.T. 155, 158), but Student's physical size was difficult to judge due to the camera angle.

of Speech/Language, as well as a Positive Behavior Support Plan addressing among other things compliance with directives and physical aggression towards others and to property. Program modifications and items of specially designed instruction related to behavior; and related services (Speech/Language Therapy; door to door transportation; and personal care support) were also included. The IEP specified emotional support at a supplemental level. (S-4)

6. Student had a Crisis Plan in the IEP that provided for a series of steps to assist Student in de-escalating. The first step was a period of 45 minutes in the learning support classroom using calming strategies; the second step was to call the Parent to meet with and help calm Student for return to the classroom; and the third step was for the Parent to take Student home. (S-4 p. 8)

7. Student's Crisis Plan was revised on August 26 and September 14, 2016. The resulting Crisis Management Plan specified a number of triggering and escalated behaviors. Preventative techniques were to be used when triggering behaviors occurred, and de-escalation and safety techniques were to be used when the escalated behavior occurred. The latter included contact with the Parent or school police if parental contact was not made. The final intervention provided that Student be transported to a local psychiatric facility. (S-9)

8. Although the Crisis Management Plan provided for crisis services when behavior reached a certain level, the two agencies that provide such services in the school did not have permission from the Parent to be involved with Student in a crisis situation in the fall of 2016. The reference to calling those agencies was removed from the August and September versions of the Plan. (N.T. 172-74; S-9)

9. In the 2016-17 school year, Student attended the second grade classroom for the first six periods of the school day, then went to the learning support classroom for the final three class periods. Student's related arts classes were during the final three class periods. (N.T. 123-25)

10. Student had a PCA assigned to Student throughout the school day for the 2016-17 school year. A different PCA was assigned after the start of the school year at the request of the Parent, and for a few days before that person was hired, other PCAs were assigned to Student. The new PCA began on September 19, 2016, a day on which Student was absent from school, and first met and worked with Student on September 20, 2016. (N.T. 36-37, 123, 128-32, 144-45, 147, 168-69, 175)

11. Student's teachers and the PCA used a variety of strategies to assist Student in communicating and managing behaviors. (N.T. 42-43, 125-27, 130-31; S-21)

12. The elementary school principal advised staff that she was responsible when Student required intervention and should be called in circumstances of physical aggression. Student engaged in physical aggression on nearly a daily basis, including hitting, kicking, and biting others. Student's crisis plan was implemented every day that Student attended school. (N.T. 46-47, 51, 54-55, 60, 132, 148)

13. On September 20, 2016, Student's Parent brought Student to school at approximately 10:00 a.m. When Student arrived at the second grade classroom, Student was seated at a table with the newly assigned PCA. The teacher gave Student a test but did not require Student to take the test at that time. The Parent left the classroom for a meeting in the building. (N.T. 26, 39)

14. Student sat calmly at the table before beginning to engage in disruptive behavior toward the PCA and exhibiting physical aggression. A male aide interrupted the Parent's meeting because Student was engaging in those behaviors. (N.T. 26-27, 35, 44-46)

15. As a result of Student's behaviors, the teacher called the principal. When the principal arrived, Student was easily escorted out of the classroom without incident. (N.T. 46-48, 51, 57-59)

16. The Parent also arrived and took Student to a different part of the building. The Parent then left the school and the principal resumed other duties, while the learning support teacher led Student to the classroom for lunch. (N.T. 28-29, 60, 133-35)

17. The principal returned to the learning support classroom to help transition Student back to the classroom after lunch. Student again began engaging in physically aggressive behaviors, hitting and kicking the principal. As the teacher led Student from the classroom into the hallway, Student tore posters from the walls and removed items from nearby lockers. Student also resumed physical aggression toward the principal to include spitting and biting in addition to hitting and kicking, and additional physical aggression toward the learning support teacher. The principal and learning support teacher decided to contact the Parent and did so; other Crisis Management Plan interventions were attempted without success. (N.T. 29-30, 60-67, 135-36, 138, 140, 150; S-25)

18. At some point during the physical aggression in the hallway, the principal bent down to retrieve an item. Student jumped up and punched the principal in the back of the head several times. The principal stood up and experienced severe pain in the head, described as a nine on a scale of one to ten, and not unlike a migraine headache from which she occasionally suffered. The principal was quite upset at the time. (N.T. 66-69)

19. The learning support teacher led Student back into the sensory room with the principal, and Student continued acts of physical aggression toward both. The male aide used a brief form of physical restraint on Student, who calmed down. Student then found a seat in the room. (N.T. 69-74, 140-41; S-11)

20. When the Parent returned to the school, she arrived at the sensory room where Student was seated. Student got up and went to the Parent, who spoke briefly with the principal while Student picked up the various papers and other items on the floor. The Parent then took Student home. (N.T. 30-32, 76, 141)

21. Staff took five photographs shortly after the incident, two depicting items that Student had thrown in the hallway and three depicting the principal's injuries to her neck and arms. (N.T. 78-79, 94, 110, 142, 152-54; S-18)

22. The principal made a few telephone calls, then left the school building approximately thirty minutes after the male aide restrained Student. The principal drove herself home where she took a medication for migraine headaches and lay down for approximately one half hour, by which time the pain had abated significantly. Approximately five hours after the incident ended, the principal drove herself to a medical facility for treatment for soreness in the back, neck, and head. (N.T. 79-81, 95-96)

23. The principal suffered a trauma-induced migraine from the punches to the head, and the medication she had taken at home had greatly relieved the pain in her head. Pain at the time of the visit to the medical facility was reportedly mild. The physician provided diagnoses of contusions (head, lower and upper back), neck abrasion, and a bite wound on an upper arm. (N.T. 80-82, 94, 102-03; S-19 pp. 1-4)

24. The physician at the medical facility did not prescribe medication, but recommended that the principal stay home from work the following day and return to the medical facility in two days' time or sooner if symptoms worsened. (N.T. 82-83, 97-98)

25. The principal called in sick on September 21, 2016, but did go to the elementary school building for a period of time that day. (N.T. 100-01)

26. At the follow-up visit to the medical facility on September 22, 2016, the principal reported worsened pain in the neck and shoulder as well as low back. Diagnoses on that date were strain (neck and back) and contusions. The physician prescribed a ten-day supply of a muscle relaxant and physical therapy twice each week. The principal went to physical therapy and occasionally took a muscle relaxant through the date of the due process hearing. She also returned for follow-up medical appointment on September 29, 2016. (N.T. 84, 86, 99-100; S-19 pp. 5-24)

27. The District determined that the elementary school principal had suffered a serious bodily injury and that Student should be removed to a 45-day placement in an alternative educational setting. (N.T. 180)

28. A meeting of Student's IEP team convened and concluded that Student's behavior on September 20, 2016 was a manifestation of Student's disability and was not a direct result of a failure to implement Student's IEP. The team also discussed potential 45-day placements as well as instruction in the home. (N.T. 180-84, 195-96, 198, 207-08; S-17)

29. The IEP team considered three Approved Private Schools for Student, only one of which (hereafter APS) accepted Student. The APS provides a therapeutic setting with staff trained in crisis intervention. (N.T 182, 187-88, 208-10)

30. On September 23, 2016, the District sent a Notice of Recommended Educational Placement (NOREP) for Student to attend the APS for a period of 45 days. The Parent did not approve the NOREP and filed a due process complaint. (N.T. 188; S-13, S-23)

31. Student was not provided any educational programming between September 21, 2016 and the date of the due process hearing on October 17, 2016. (N.T. 24, 198)

32. Student's Parent has concerns for Student's safety in the elementary school. (N.T. 25-26, 32-24)

33. Student's Parent has concerns for Student's safety in the proposed alternative educational setting. (N.T. 25)

34. Student experiences difficulty transitioning from one activity to another, which frequently triggers problematic behavior. (NT. 32, 146-47, 168-69, 195; S-1 p. 8, S-4 p. 15, S-5)

35. An Independent Educational Evaluation (IEE) of Student is currently in progress. (N.T. 170, 210)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found

all of the witnesses to be credible, each testifying to the best of his or her recollection. There was little conflict in the testimony and none regarding any facts material to the issue presented.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the closing arguments of the parties.

IDEA PRINCIPLES – DISCIPLINARY PROVISIONS

The IDEA provides a number of important protections when a Local Education Agency (LEA) seeks to impose discipline to a student who is eligible for special education. As is relevant here, an LEA is permitted to remove an eligible child to an alternative educational setting on an interim basis under certain "special circumstances."

> School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—
>
> * * *
>
> (iii) 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); *see also* 34 C.F.R. § 300.530(g)(3).

The Parent also had the right to challenge any decision regarding such a placement in an expedited due process hearing.

> **Appeal**.
>
> (A) In general. The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.
>
> (B) Authority of hearing officer.
>
> (i) In general. A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

> (ii) Change of placement order. In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—
>
> (I) return a child with a disability to the placement from which the child was removed; or
>
> (II) 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); *see also* 34 C.F.R §§ 300.532(a) and (b).

THE CLAIMS OF THE PARTIES

The primary issue presented by the parties is whether Student's conduct on September 20, 2016 resulted in serious bodily injury to the principal. The IDEA provides the specific definition for the term "serious bodily injury" in Section 1415(k)(7)(D), referring to Section 1365 of Title 18 (the code section defining Crimes and Criminal Procedure), which provides:

> [T]he 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[.]

18 U.S.C. § 1365(h)(3). Only Subsection (B) is arguably at issue. When these four categories 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. The initial question for this hearing officer, thus, is whether the physical pain from the injury suffered by the principal rose to the level of extreme within the meaning of the statutory definition.

There can be no doubt that the principal experienced a period of significant pain on September 20, 2016 from Student's conduct. Despite that pain, she remained at school for approximately a half hour performing tasks that included making telephone calls before leaving the building to drive herself home. Subjectively, the principal described the pain she felt to her head as "severe," comparing it to a sudden migraine similar to what she experiences from time to time, and estimated its severity immediately after the incident as a nine on a scale of one to ten. However, that pain was significantly relieved within a half hour of her return home and, by the time of her visit to a medical facility later that same day, was described as mild. No pain medication was prescribed by the treating physician; and physical therapy was not recommended until two days later. The principal was able to return to the school building the day after the incident for a short period of time. The pain she experienced on September 20, 2016 and in subsequent days and weeks, while clearly very real, simply cannot be considered by this hearing officer to be of the very high degree required by the relevant statutory language quoted above.

Further instructive on the question of whether the principal suffered a "serious bodily injury" is the companion definition for "bodily injury." While that language is not incorporated as part of the IDEA, one may contrast the two definitions that appear within the same subsection of Title 18 of the U.S. Code.

> [T]he 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; or
>
> (E) any other injury to the body, no matter how temporary.

18 U.S.C.S. § 1365(h)(4). Construing the two definitions together, there can be no question that "serious bodily injury" requires an acute impact on the victim. It is noteworthy that, with the exception of the trauma-induced migraine headache, the principal's injuries on the date in question all clearly fall within the "bodily injury" definition. And, as explained above, the nature of the pain to the principal's head cannot be construed to meet the requisite high-threshold "extreme" nature required by the statutory definitions in Title 18.

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 on September 20, 2016, this hearing officer cannot find that the facts in this matter establish such egregious circumstances as to constitute serious bodily injury.

For these reasons, this hearing officer concludes that the District's unilateral removal to an alternative placement at the APS did not comport with the protections afforded to Student under IDEA. Nevertheless, she also does not conclude that a return to the home elementary school is the appropriate remedy. As set forth above, the IDEA unambiguously permits a hearing officer to return the child to the previous placement, or to order a change in placement upon a finding that maintaining the current placement would be "substantially likely to result injury to the child or others." 20 U.S.C. § 1415(k)(3).[5] In this matter, District staff

[5] Longstanding principles of statutory construction dictate that it is "the text of the statute" that is controlling, absent ambiguity within the statute. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 611 (3d Cir. 2015)

unquestionably believe that Student's placement in the home elementary school is inappropriate and that there is a significant risk that Student or others would be injured in that environment if Student returns; and, the Parent testified unequivocally to holding that same viewpoint (NT. 25-26, 32-24). The evidence is overwhelming that there exists a substantial likelihood of injury to Student and to others, despite the intensive behavioral interventions that have been attempted this school year, should Student's placement be maintained at the home elementary school. Accordingly, this hearing officer will not simply overturn the District's unilateral placement determination and will instead order a change in placement as permitted by 20 U.S.C. § 1415(k)(3)(B)(ii)(II).

Pursuant to the applicable provisions, the duration of the change in placement may not exceed 45 school days. 20 U.S.C. § 1415(k)(1)(G). The record is clear that Student has not attended school since September 21, 2016, and for a total of approximately 20 school days from the date of the September 23, 2016 NOREP. Giving credit for the period of time that Student has already been removed from the home elementary school, this hearing officer will order the interim placement for a period of 25 school days.[6] Further, because Student's IEP team has already determined the APS to be an appropriate interim alternative educational setting, as an environment that is able to provide the full time emotional support and therapeutic services that

(quoting *King v. Burwell*, __ U.S. ___, ___, 135 S. Ct. 2480, 2492 (2015)). In making the determination of whether ambiguity exists, one must "bear[] in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *G.L., supra*, 802 F.3d at 611 (quoting *King*, 135 S. Ct. at 2492. Even if the text of Section 1415(k)(3) might be considered ambiguous, which this hearing officer does not, the Department of Education has explained that hearing officers must "exercise their judgment in the context of all the factors involved in the individual case" regarding an interim alternative educational setting. 71 Fed. Reg. 46724 (2006). This construction is wholly consistent with the overall purpose of the IDEA in ensuring that children with disabilities are provided with a free, appropriate public education based upon their individualized needs. And, despite commentary by a Senate Committee in 2003 that the remedy ordered by a hearing officer in this type of appeal is related to which party requested the hearing, S. Rep. 108-185 at 45, the language of the statute as enacted does not include such limitation.

[6] The parties may agree to extend that time period. 20 U.S.C. § 1415(k)(1)(H)(4); 34 C.F.R. § 300.533.

Student unmistakably requires at the present time, this hearing officer concludes that that APS placement is an appropriate interim placement.[7] Finally, while it is true that this result will require Student to undergo transitions to and from the interim placement, such an Order is necessary for the safety of Student and others; and, Student's IEP team is and will be in the best position to carefully consider and plan for appropriate supports that Student will need in order to make those transitions successfully.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's unilateral placement of Student was not proper under the IDEA, but that Student nonetheless requires removal to the APS as an alternative educational setting for a period of 25 school days.

ORDER

AND NOW, this 25th day of October, 2016, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's unilateral removal of Student to the APS exceeded its authority under the IDEA at 20 U.S.C. § 1415(k)(1)(G)(iii) and its implementing regulations at 34 C.F.R. § 300.530(g).

2. Returning Student to the home elementary school from which Student was removed is substantially likely to result in injury to Student or to others.

[7] To the extent that there may remain any question over whether instruction in the home might be appropriate, this hearing officer agrees with the persuasive testimony of the various District witnesses that that level of support would not be sufficient to meet Student's needs (N.T. 183-84, 210) on anything other than a very temporary basis as might be necessary to implementation of the attached Order or any subsequent programming changes.

3. Student's placement is changed to the APS as an alternative educational setting for a period of 25 school days.

4. As soon as possible, and not later than October 31, 2016, the District shall confirm Student's continued acceptance at the APS and communicate same to the Parent, and the 25 school day interim placement shall begin on the first day that Student attends the APS.

5. If the APS is no longer able to accept Student as of October 31, 2016, Student's IEP team shall meet as soon as possible and within no more than five school days of October 31, 2016 to determine a different appropriate interim placement.

6. Nothing in this Order shall be read to preclude the parties from mutually agreeing to alter any of its terms, including the location of the interim alternative educational setting.

It is **FURTHER ORDERED** that any claims not specifically addressed by this Decision and Order are DENIED and DISMISSED.

Cathy A. Skidmore

_____

Cathy A. Skidmore
HEARING OFFICER