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 No.

27284-22-23

CLOSED HEARING

Child's Name:

V.F.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

12/14/2022

Introduction and Procedural History

This matter is an expedited special education due process hearing. The procedural history of this matter is unusual and provides context for the case. The matter concerns an elementary school-age child with disabilities (the Student), the Student's parents (the Parents), and the Student's public school district (the District). The District requested this hearing. The matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

The Student has a rare, genetic disorder. There is no dispute that the Student engages in various behaviors, some of which are physical, because of the disorder. Both parties agree that the Student injured others while engaging in these behaviors.

The District determined that the injuries are "serious bodily injuries" as defined by 18 U.S.C. § 1365(h)(3). The District then removed the Student from the Student's neighborhood elementary school and placed the Student in an Interim Alternative Educational Setting for 45 school days (the IAES) pursuant to 20 U.S.C. § 1415(k)(1)(G)(iii). The IAES is a District-run Life Skills program located in one of the District's elementary schools – but not the Student's neighborhood elementary school (the NES). According to its complaint, the District's intention was to use those 45 school days to conduct a Functional Behavioral Assessment (FBA) and then change the Student's Individualized Education Program (IEP), depending on what the FBA revealed.

The Parents refused to send the Student to the IAES and kept the Student at home instead. Consequently, the District was not able to conduct the FBA. The District then concluded that returning the Student to the neighborhood elementary school was substantially likely to result in injury to the child or to others. Relying on a seldom-used IDEA regulation, the District requested this hearing to extend the 45-day IAES placement so that it could conduct the FBA.

The Parents participated in this matter *pro se* for some time and then retained counsel. The Parents then filed their own complaint, which is pending as ODR No. 27294-22-23. Therein, among other things, the Parents claim that the Student's Individualized Education Program (IEP) was inappropriate and not implemented with fidelity while the Student attended the neighborhood elementary school, and that the IAES placement was inappropriate and dangerous (justifying their decision to keep the Student at home). The Parents also challenged the District's determination that the Student caused serious bodily injuries. The Parents demanded, among other

things, the Student's immediate return to the neighborhood elementary school.

The 45-day IAES placement was scheduled to end on December 6, 2022. During a pre-hearing conference call, the District clarified that would return the Student to the neighborhood elementary school at that time. After additional pre-hearing correspondence, the Parents withdrew their demand for the Student's immediate return to the neighborhood elementary school. The remainder of the Parents' claims are proceeding on the IDEA's non-expedited timeline even as the District's complaint proceeded as an expedited due process hearing.

Shortly after the pre-hearing conference call, it became clear that the Student would be back at the neighborhood elementary school before the issuance of this decision and order. I determined that I would treat the District's complaint as if the District were asking to remove the Student to the IAES, not demanding an extension of the IAES. The distinction makes no difference in terms of what the District must prove. Neither party objected.

It is the District's burden to prove that maintaining the Student's current placement school is substantially likely to result in injury to the Student or to others. "Placement" is a term that is used but not defined by the IDEA. Below, I determine what "placement" means when it appears in the section of the IDEA that controls this case. Based on that determination, and for other reasons stated below, I find that the District has not met its burden.

Issue

The District requested this hearing, which is proceeding under 20 U.S.C. § 1415(k)(3)(A). The single issue presented is: is maintaining the current placement of the child is substantially likely to result in injury to the child or to others?

The parties take different views of what relief should be awarded if the answer is "yes." Their arguments are discussed below but, for context, the District argues that I should place the Student in the IAES for 45 days. The Parents argue that I should not place the Student in the IAES but rather should place the Student into some other appropriate placement.

Findings of Fact

I reviewed the record in its entirety but make findings of fact only as necessary to resolve this matter. I find as follows:

1. There is no dispute that the Student is a child with a disability, as defined by the IDEA.

2. There is no dispute that the District is the Student's Local Educational Agency (LEA), as defined by the IDEA.

3. There is no dispute that the Student injured other people while attending the neighborhood elementary school (the NES).[1]

4. There is no dispute that the Student's behaviors resulting in injuries are a manifestation of the Student's disability.

5. The 2022-23 school year was the Student's first year at the NES. *Passim.*

6. During the 2021-22 school year, the District proposed an IEP for the 2022-23 school year. Initially, the District offered part time placement in a Life Skills classroom in one of the District's elementary schools, but not the NES (the same placement that would become the Student's IAES). *See, e.g.* S-3.

7. On August 24, 2022, the Student's IEP team reconvened. The Parents did not want the Student to attend the District's proposed Life Skills program. The IEP team ultimately agreed to place the Student in an itinerant Autistic Support program within the NES (the 2022 IEP). S-3.

8. The 2022 IEP included information about the Student's present levels of education and functional performance. These included concerns about the Student's unprompted and physically aggressive behaviors. *See, e.g.* S-3 at 11.

9. The 2022 IEP included goals for listening comprehension, number identification, number counting, letter-sound correspondence, following directions, and sight words. S-3 at 18-23.

10. The 2022 IEP included many program modifications and specially designed instruction (SDI). While the Student's goals were academic in nature, the SDIs were behavioral in nature or related to the nature of the Student's disability. Among other things, they included: a total communication approach to instruction, individual to support

[1] On several occasions, the Parents moved to exclude information about the nature of those injuries, arguing that there was no dispute that the Student injured other people, and the question of whether any of those injuries amount to serious bodily injury is presented in the Parents' compliant.

classroom participation and provide personal care, frequent breaks, a slant board, a visual and predictable schedule, ABA programming, a positive behavior support plan (PBSP), transition warnings, sensory activities, visual supports, processing time, peer interaction to develop social skills, and positive reinforcement. S-3 at 24-25.

11. The IEP states that a PBSP should be attached to it. Neither the copy of the IEP that the District submitted (S-3) nor the copy that the Parents submitted (P-1) has a PBSP. No PBSP was submitted as a separate exhibit. An "Interim Behavior Intervention Plan" from "September 2022" was submitted as P-4, but the record does not reveal if this was ever finalized or indented to be the PBSP referenced in the 2022 IEP.[2]

12. The "individual to support classroom participation and provide personal care" is understood to be a 1:1 support person assigned to the Student (as opposed to the classroom).

13. The Student did not have a consistent person to provide 1:1 support. Instead, the person kept changing as different providers refused to work with the Student because of the Student's behaviors. On some occasions, the District staffed the position based on whoever was available. *Passim*.

14. The 2022 IEP provided group speech and language therapy and group physical therapy, both at thirty 30-minute sessions per IEP year.

15. Under the 2022 IEP, all services were provided in a regular classroom. S-3 at 30.

16. August 29, 2022, was the Student's first day at the NES. *See* S-8.

17. Between August 29 and September 16, 2022, the District tracked the Student's behaviors at the NES. The method of tracking and the definitions of the Student's behaviors evolved over time. P-11 through P-19, S-7, S-8, S-15.

18. On September 2, 2022, the Student injured a Special Education Teacher Assistant (the Assistant). S-1. Both parties agree that the Student injured the Assistant on September 2, and that the Student's behavior was a function of the Student's disability. Questions about

[2] There is some testimony that the District issued a PBSP shortly after removing the Student from the NES. NT at 184.

the nature of the injury and whether the injury meets the statutory definition of "serious bodily injury" are pending at ODR 27294-22-23 (Parents' complaint).

19. The District sought the Parent's consent to conduct an FBA. The Parents provided consent on September 8, 2022. S-13.

20. On September 9, 2022, the Student had a "meltdown" and hit another student, attempted to throw objects, and scratched District staff. There is no evidence that the Student injured the other student and the District does not claim that the scratches constitute injury. S-10.

21. Sometime between September 13 and 16, 2022, the Student injured another person who was assigned to provide one-to-one (1:1) support for the Student (the 1:1 Provider). S-2. Both parties agree that the Student injured the 1:1 Provider between September 13 and 16, 2022, and that the Student's behaviors were a function of the Student's disability. Questions about the nature of the injury and whether the injury meets the statutory definition of "serious bodily injury" are pending at ODR 27294-22-23 (Parents' complaint).

22. On September 13, 2022, the Student injured a third person who was escorting the Student to the bathroom. S-4, S-5. Both parties agree that the Student injured this person on September 13, 2022, and that the Student's behaviors were a function of the Student's disability. The Parents allege that the Student's behaviors, although a function of the Student's disability, were exacerbated by [an illness]. Questions about whether the injury meets the statutory definition of "serious bodily injury" are pending at ODR 27294-22-23 (Parents' complaint).

23. On September 1, 6, 8, 12, 15, and 16, the Student engaged in behaviors that prompted teachers to clear other children from the classroom. S-7.

24. On most days, the Student also engaged in positive behaviors, earning praise from teachers. *See, e.g.* S-8.

25. From September 12 through September 16, 2022, the District worked with a third party retained by the Parents to define and monitor the Student's behaviors. Student's behaviors were defined as follows (*see* S-15):

a. Refusal (verbal protest or motor action that is incompatible with a non-negotiable requested task).

b. Tantrum (dropping to the ground, crying or yelling above normal conversational level).

c. Aggression (hitting, kicking, grabbing another individual, pulling hair, scratching, or biting).

d. Elopement (moving more than three feet away from the expected area during an adult demand or adult-led activity without verbalizing leaving for an appropriate reason and coming back within a timely manner).

e. Property Destruction (damaging property by breaking objects into two or more pieces, using objects to break other objects, ripping objects or parts from walls, floors, or furniture, throwing objects with the intent to break them, and dumping objects out of where they belong)

26. From September 12 through September 16, 2022, the Student engaged in all the defined behaviors multiple times during each school day. S-15.

27. From September 13 through September 21, the District logged the Student's behaviors in 15-minute increments, tracking whether the Student was "On-Task," "Speaking Respectfully," "Respecting Property," "Hands and Feet to Self," and "Stay[ing] in Area." These domains are not defined, but loosely track the defined behaviors proposed by the third party. These records are accompanied by contemporaneously drafted anecdotal notes. Taken together, these establish that the Student was frequently engaged in negative behaviors. Some of those behaviors, like toppling furniture and throwing objects, carry an inherent danger. S-15 at 15-24.

28. Sometime after this data was collected, the District compiled the data into a "Behavior Analyst Update." S-16. That document is undated and is not an FBA. Rather, it is a compilation and commentary on the behavioral data described above. The document includes only five days of data, draws few conclusions about the antecedents or functions of the Student's behavior, and explicitly warns that "any conclusions should be interpreted with caution and the data will continue to be monitored and assessed for any patterns" and that a "Functional

Behavior Assessment (FBA) should be completed in any new placement decided upon." S-16 at 8.

29. While the Behavior Analyst Update is not an FBA, it does include important information about how the Student's IEP was and was not being implemented when behaviors were observed. The summary unambiguously establishes that the Student engaged in dangerous behaviors less frequently when the 2022 IEP was implemented with fidelity. *See* S-16. Examples include:

    a. The Student was better able to attend to academic tasks when the curriculum was modified. S-16 at 1.

    b. Using ABA strategies like errorless teaching coincided with reduced property destruction. S-16 at 4-5.

    c. The Student was more likely to *not* keep hands and feet to self, "in response to the presentation of demands, unclear expectations, when access to certain activities, events, objects, or areas were not available, and when using the bathroom." S-16 at 6.

    d. The Student was less likely to elope when "provided with praise and frequent attention, non-contingent access to sensory/comfort items and/or preferred stimuli … [Student's] schedule remained consistent, advanced warning was provided, timers were used, reminders of the sequence of events were provided, game or game-like activities were presented, frequent movement breaks were incorporated, attempts at functional communication were honored, and errorless learning strategies were used." S-16 at 7.

30. The same document also suggests that the Student's potentially dangerous behaviors increased when the Student confronted situations that the IEP, if implemented with fidelity, was designed to mitigate. *C/f* S-3, S-16.

31. The Parents retained a private, doctoral-level inclusive education consultant who drafted a "Report and Recommendations" dated September 23, 2022. This document includes the consultant's credentials, legal interpretations, and analysis of articles. The consultant includes a recommendation to return the Student to the NES and implement inclusionary practices. The document does not

include any information specifically about the Student gained either through observation or assessment. S-9.

32. On September 23, 2022, the District convened a manifestation determination meeting. During that meeting, the District members of the team checked a box to indicate "Yes" to the question: "Is the disciplinary behavior caused by, or had a direct and substantial relationship to the child's disability?" P-9.

33. At the same meeting, the team also checked a box to indicate "Yes" to the question: "Is the disciplinary behavior a direct result of the local educational agency's failure to implement the IEP?"

34. Nothing on the record, including testimony from District witnesses, indicates the "failure to implement the IEP" box was checked in error. *See, e.g.* NT at 263.

35. Other witnesses, including a BCBA retained by the Parents who worked with the Student in school and attended the manifestation determination meeting, testified that the box was checked correctly. *See, e.g.* NT at 182.

36. The same witness testified credibly as to her direct observations about the lack of fidelity with which the District implemented the IEP, including the lack of consistent 1:1 support, lack of a PBSP, and failure to implement SDI and modification to ease the Student's transitions, improve the Student's on-task behaviors, and decrease the Student's potentially dangerous behaviors. *See* NT at 182-187. Except for extent to which the District modified the curriculum for the Student, this testimony is essentially unrefuted.

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.

This does not mean that I assign equal weight to all testimony. Determinations about the weight of testimony are discussed below.

Applicable Laws and Regulations

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, the District is the party seeking relief and must bear the burden of persuasion.

Substantial Likelihood of Injury

The IDEA grants significant disciplinary protections to children with disabilities. *See generally,* 20 U.S.C. § 1415(k). Those protections include several exceptions, most of which are designed to enable schools to protect the safety of those who learn and work within their walls, including children with disabilities. The question posed in this case comes directly from one of the exceptions, found at 20 U.S.C. § 1415(k)(3)(A) (italics added):

> 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.

The District requested this hearing because it believes that maintaining the Student's placement in the NES is substantially likely to result in injury to the Student or to others. When such hearings are requested, the IDEA requires me to determine if maintaining the placement is substantially likely to result in injury. 20 U.S.C. § 1415(k)(B)(i). After making that determination, the IDEA gives me two choices, codified at 20 U.S.C. §§ 1415(k)(B)(ii)(I) and (II). I may either:

> (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.

Federal IDEA implementing regulations at 34 C.F.R. §§ 300.532(b)(2)(i) and (ii) clarify these choices. I may either:

> (i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or
>
> (ii) Order a change of placement of the 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 the child is substantially likely to result in injury to the child or to others.

In sum, if maintaining the Student's placement at the NES creates a substantial likelihood of injury to the Student or to others, I may change the Student's placement to an appropriate IAES for 45 school days. If the Student's placement at the NES does not create a substantial likelihood of injury to the Student or to others, such an order is unwarranted.

Definition of "Injury"

The IDEA defines the term "serious bodily injury" by borrowing from 18 U.S.C. § 1365(h)(3). *See* 20 U.S.C. § 1415(k)(7)(D). In contrast to serious

bodily injury, the IDEA also uses the term "injury," but does not define that term. *See above*. The IDEA contrasts the terms "injury" and "serious bodily injury," and the juxtaposition reveals that injury is something less than serious bodily injury. I conclude the term "injury" as used in the IDEA has the same definition of "bodily injury" found at 18 U.S.C. § 1365(h)(4).

Definition of "Placement"

The IDEA uses but does not define the term "placement." Generally, the IDEA uses the term "placement" when discussing physical locations. *See* 34 C.F.R. §§ 300.115, 116. Those same regulations, however, illustrate that "placement" also relates to the services that are or could be provided in various physical locations. For example, consideration of a placement must "make provision for supplementary services." 34 C.F.R. § 300.115(b)(2). Also, a child's placement must be made by people who are "knowledgeable about the child [and] the meaning of the evaluation data." 34 C.F.R. § 116(a)(1). Further, a child's placement is "based on the child's IEP." *Id* at (b)(2).

It is an oversimplification to think of "placement" as just a physical location. Rather, the term also concerns the services available, or that could be made available, in a physical location. A general education classroom and a special education classroom are, therefore, different placements even if both are located within the same school building.

Discussion

The first question I must resolve is not whether maintaining the Student's placement creates a substantial likelihood of injury. The first question I must resolve is: what is the Student's placement? Both parties agree that the *location* of the Student's placement is the NES.[3] The placement itself, however, includes all the supports, modifications, and specially designed instruction included in the Student's IEP.[4] That is the only way that the Student's placement can be "based on the child's IEP" as the regulations require. *See* 34 C.F.R. § 116(b)(2).[5]

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[3] The NES is, by definition, the least restrictive location for the Student's program. *See, e.g.* 34 C.F.R. §§ 500.114, 115; *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993). The IDEA permits the District to remove the Student from the Student's LRE if maintaining the Student's LRE placement creates a substantial likelihood of injury. If the District were required to maintain the Student's LRE placement under those circumstances, the portions of the IDEA at issue in this case would be irrelevant.

[4] *See also* NT 182 (my statement of this principle during the first of two hearing sessions).

[5] In other cases, for convenience, I have described "placement" as a physical location and "program" as the services that a child receives. I have always done so explicitly, and never

That IEP was not implemented with fidelity prior to the Student's removal. The District affirmatively indicated on disciplinary paperwork that the Student's IEP was not implemented with fidelity. No evidence – either witness testimony or other documents – indicate that paperwork was an accident or other error. The District's employees were equivocal in their testimony about the fidelity of IEP implementation. Some of those witnesses testified that the frequency with which the Student's service providers changed made faithful implementation difficult or impossible. The private BCBA's testimony concerning direct observation of IEP non-implementation was credible. The District's doctoral-level BCBA did not refute testimony concerning inconsistent IEP implementation but rather testified that fidelity data was not collected.

It is rare to collect fidelity data independently and doing so is not typically a necessary component of an appropriate IEP. Instead, fidelity is typically established through other means. In this case, however, there is a preponderance of evidence that the District did not consistently implement the Student's IEP as written.

The record also establishes the Student's propensity to engage in dangerous behaviors in the NES when the IEP was not implemented. Obviously, the record does not include evidence establishing how the Student would have behaved if the IEP had been implemented with fidelity. The District has no obligation to prove what might have been. However, the testimony of District witnesses about the Student's likely future behaviors was, in most cases, predicated on the faulty assumption that the Student's IEP was consistently implemented as written. That faulty assumption diminishes the weight of such predictions. Said differently, the record of this case does not establish how the Student will likely behave if the Student consistently receives all the supports, modifications, and SDI that should be provided through the Student's IEP.

This case also stands in sharp contrast to another recent decision in which I found that maintaining a student's placement was substantially likely to result in injury to the child or to others. In *In re: C.R., a Student in the Bensalem Township Sch. Dist.*, ODR 26100-21-22, there was no question that the school implemented the child's IEP with fidelity. Moreover, both through IEP revisions and informal agreements between the school and the parent, the school provided consistent and increasing behavioral support without success. The frequency and nature of the Student's behaviors in this

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when the issue was outcome determinative, because those simplistic definitions do not square with IDEA regulations as written.

case are also quite different from the frequency and nature of the student's behaviors in the *C.R.* case. There is no magic formula that takes the frequency and nature of behaviors as inputs and then computes the likelihood of future injuries. Rather, in the *C.R.* case, the District did everything that could reasonably be expected to make the student's placement safe before concluding that maintaining the placement was substantially likely to result in injury. The record of this case reveals no similar effort, but rather a lack of consistent IEP implementation.

For clarity, I reject most of the Parents' legal argument. Neither the IDEA, or its federal regulations, nor Pennsylvania regulations at 22 Pa. Code § 14 (Chapter 14) create a third path remedy. I must either maintain the Student's placement or place the Student into an appropriate IAES. Further, I reject the argument that I cannot look to the Student's past behavior to draw conclusions about how the Student will behave in the future. Every case to consider this issue does just that. Also, I reject the argument that the Student's behaviors are not dangerous. They are dangerous. The fact that the Student's behaviors do not result in injury more frequently is a spot of good luck in an otherwise deeply sad case.

I do, however, agree with the Parents that the District cannot fail to implement the Student's IEP, and then use that failure to support a claim that the Student must be removed from the NES. The IDEA permits LEAs to remove children with disabilities from their least restrictive environment (LRE) when doing so is necessary to prevent the substantial likelihood of injuries. In this case, the SDI and modifications in the Student's IEP provide behavioral supports. The District cannot fail to provide those supports with fidelity, and then point to the Student's behaviors as the basis for the Student's removal.[6]

While I agree with the Parents' logic, that logic does not form the basis of my decision. Rather, I look to the evidence presented and consider whether the District met its burden under *Schaffer v. Weast, supra*. The record establishes that the Student's behaviors are a function of the Student's disability.[7] The record also establishes that Student's behaviors are both

[6] This is not true for the original 45-day removal in which the District claims that the Student's actions resulted in serious bodily injury. Like weapons and drugs, serious bodily injury creates a broad exception to the IDEA's disciplinary protections. The question of whether the Student's actions resulted in serious bodily injury is the subject of the Parents' pending due process complaint but is not an issue in this case.

[7] During the hearing, the Parents expressed offence that the District construed the Student's behaviors as intentional or volitional. The District did not – and has never – made such a clam. The District has always acknowledged that the Student's behaviors are a function of the Student's disability.

frequent and likely to result in "injury" as defined above. Therefore, I find that keeping the Student in the NES with an IEP that is not implemented with fidelity is substantially likely to result in injury to the Student or to others. This finding, however, falls short of the District's actual burden. That burden is to prove that maintaining the Student's *placement* is substantially likely to result in injury to the Student or to others. The Student's placement is not just the Student's physical location. Rather, the Student's placement is the location along with all supports, modifications, and specially designed instruction included in the Student's IEP. There is no preponderant evidence in the record that maintaining the Student's placement (the NES along with full implementation of the Student's IEP) is substantially likely to result in injury to the child or to others. I reject the District's claim on this basis.

Dicta

Time is of the essence, and further analysis is needed to prevent both parties from hanging in limbo if this matter is appealed. I will address this practical problem as I did in *In re: C.R., a Student in the Bensalem Township Sch. Dist.*, ODR 26100-2122. I acknowledge a lack of case law from the Third Circuit on this topic. To my knowledge, no case from Pennsylvania defines the term "placement" for purposes of 20 U.S.C. § 1415(k). If my analysis is wrong – if placement refers to physical location alone – the outcome of this case is different. If the fidelity with which the Student's IEP was implemented is not a factor in the analysis, the District met its burden. Maintaining the Student in the NES with an IEP that is not implemented with fidelity is substantially likely to result in injury to the Student or to others.

There is no preponderance of evidence in the record to prove that the District's offered IAES is inappropriate. Consequently, if "placement" means the NES with an inconsistently implemented IEP, the District can and should remove the Student to its proposed IAES for 45 school days. I believe that definition of "placement" runs contrary to the IDEA's purposes, but I must acknowledge that my analysis is not owed deference under judicial review.

ORDER

Now, December 14, 2022, it is hereby **ORDERED** as follows:

The District's demand to move the Student to an Interim Alternative Educational Setting for 45 school days is **DENIED** and **DISMISSED.**

The District is hereby **ORDERED** to maintain the Student's current placement, which includes faithful implementation of the 2022 IEP. Such

implementation must begin within 10 school days of this order through the conclusion of the matter pending at ODR 27294-22-23.

Nothing herein alters the parties' rights under 20 U.S.C. § 1415(j). The parties may agree to alter the Student's pendent IEP as provided therein.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order, except for claims pending at ODR 27294-22-23, is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER