BEFORE THE KANSAS STATE DEPARTMENT OF EDUCATION
DUE PROCESS REVIEW OFFICER

In the matter of the due process hearing of/on behalf of.

Petitioner,

vs. Case No. IOEP -01

UNIFIED SCHOOL DISTRICT NO.

Respondent.

REVIEW OFFICER'S REPORT

NOW, on this 26th day of February, 2010, the decision of the Reviewing Officer is rendered in the above-captioned appeal. Pursuant to K.S.A. 2005 Supp. 72-974, the Reviewing Officer has:

1. Examined the record of hearing;
2. Determined whether the procedures at the hearing were in accordance with the requirements of due process;
3. Afforded the parties an opportunity to present written argument by the filing of briefs;
4. Determined that no additional evidence should be necessary prior to rendering a final Decision;
5. Rendered an independent Decision and Report within the period which was extended by the mutual request of Petitioners and Respondent; and,
6. Has sent written notice of this independent Decision and Report to both parties and to the Kansas State Department of Education.

The Hearing Officer Kathleen Neff submitted her Decision by e-mail on December 22, 2009, and by registered mail on December 23, 2009, The Notice of Appeal was filed by

Respondent, Unified School District No. on January 21, 2010. The Notice of Appeal was timely filed. The Reviewing Officer was appointed on January 26, 2010. The Notice of Appeal and Decision of the Hearing Officer were provided to the Reviewing Officer as part of the Kansas Department of Education's letter of appointment.

A Pre-Review Conference was scheduled by telephone with counsel for Petitioner and Respondent on February 3, 2010. Following a full discussion of procedural issues, the Review Officer issued the following Pre-Review Conference Order:

1. Counsel for Respondent has agreed to provide the Review Officer a copy of Respondent's underlying Findings of Facts and Conclusions of Law, Exhibits and Hearing Transcript. Counsel for Petitioner will provide to the Review Officer, its' underlying Findings of Facts and Conclusions of Law. Counsel for Respondent and Petitioner shall submit the requested information on or before Friday, February 5, 2010.
2. Counsel for Respondent will submit to the Review Officer and to Petitioner's counsel, its pre-review position statement on Wednesday, February 10, 2010.
3. Counsel for Petitioner will submit its pre-review position statement on Thursday, February 18, 2010.
4. The Review Officer shall submit his Decision no later than Friday, February 26, 2010.
5. A second Pre-Review Conference may be conducted by telephone at the request of either party.

Following the Pre-Hearing Conference, the Review Officer receive transcripts, exhibits, and Petitioner's and Respondent's Proposed Findings of Facts and Conclusions of Law electronically and/or through overnight delivery.

NATURE OF DISPUTE

This is an appeal from a Decision rendered by Kathleen Neff, Hearing Officer, on December 22, 2009. The Hearing Officer's decision summarized two (2) issues and holdings, as follows:

A. Issue #1—Whether the 45-day suspension of student was justified under the statutory definition of serious bodily injury.

HELD: for the parent,

B. Issue #2—Whether the interim alternative educational setting in the proposed homebound services were adequate.

HELD—for the district, only because of parent and foster mother's refusal to accept proffered services.

The Hearing Officer issued a detailed analysis including findings of fact and conclusions of law holding that the 45-day suspension of student was inappropriate because the IEP Team did not consider the statutory definition of "serious bodily injury" at the manifestation determination hearing. Following the Hearing Officer's review of legal authorities, she determined that "these cases do make clear that common, minor symptoms from four knuckle wraps to the head [of the education paraprofessional] by a small child, no matter the enlargement of his knuckles, while without doubt very uncomfortable, do not qualify as extreme physical pain under 18 U.S.C. 1365(h)."

The Hearing Officer further found that the proposed homebound services, although not implemented due to parent and foster mother's lack of cooperation, were unlikely to have proven to be adequate. As a result, the Hearing Officer ordered that the student's 45-day suspension be reversed and that the student be returned to his former classroom placement. Further, that due to the District's inappropriate suspension, the student has lost 45 days of educational services, and the District was thereby ordered to provide 45 days of compensatory education.

DUE PROCESS PROCEDURES

Based upon a review of the record in this matter, it is the opinion of the Reviewing Officer that appropriate due process procedures have been followed and applied by the Hearing Office. The Reviewing Officer finds that all of the due process procedural requirements set forth in K.S.A. 72-973 have been provided as follows:

1. The hearing was held at a time and place reasonably convenient to the parent of .

2. The hearing was closed as provided in K.S.A. 72-973(b); and,

3 . The following procedural due process rights were afforded:

(a) The right of each party to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems with children with disabilities;

(b) The right of each party to be present at the hearing;

(c) The right of each party to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;

(d) The right of each party to present witnesses in person or their testimony by affidavit, including expert medical, psychological or educational testimony;

(e) The right of each party to prohibit the presentation of any evidence at the hearing which has not been disclosed to the opposite party at least five (5) days prior to the hearing, including any evaluations completed by that date and any recommendations based on such evaluations;

(f) The right to prohibit either party from raising, at the due process hearing, any issue that was not raised in the due process complaint notice or in the pre-hearing conference held prior to the hearing.

(g) The right of each party to have a written or, at the option of the parent, an electronic verbatim record of the hearing; and,

(h) The right to a written or, at the option of the parent, an electronic decision, including findings of fact and conclusions.

(i) The parties were afforded an orderly hearing; and

has been afforded a fair and impartial decision based upon substantial evidence.

4 . Furthermore, the record contains insufficient evidence that would indicate or infer that the Hearing Officer was a person:

(a) Responsible for recommending the proposed action upon which the hearing was based;

(b) Who had a personal or professional interest which would conflict with objectivity in the hearing; or

(c) Who is an employee of any agency involved in the education of

REVIEW OFFICER'S FINDINGS OF FACT

..'s Background

1. is a 12 year old special education student at School and is about 4' 3"tall and weighs 83 pounds. (Jones 227, 20-22). He is currently in the seventh grade (Jones 229, 9).

2. . has a disability that often leads to his hitting his hands and his head against objects and other people. (Jones 225, 7-18).

3. Due to the symptoms of 's disability, his knuckles are hardened, callused, and twice the normal size. (Kirby 164, 11-25; 165, 1).

4. . is described as pretty strong and requires two to three adults to control him when he is out of control (Davidson 34, 17; 42, 22-25; 43, 1-4).

5. . is not always volatile but can be periodically out of control and it is difficult to predict when he is going to strike someone. (Davidson 42, 19-21; 47, 11-14; Kirby 168, 1825; Parent 220, 14-20).

6. Deborah Davidson is a paraprofessional at School and has worked with . during the current school year and the preceding school year. (Davidson 43, 19-21).

7. . has hit Ms. Davidson on multiple occasions. (Davidson 31, 15-17).

8. He lives with his foster parent, Ms. (Jones 227, 18). Ms. is his maternal grandmother and she has been granted educational guardianship to pursue this matter. (Neff 7, 6-9).

9. . is currently prescribed Clonidine, Zoloft, Trazadone and Risperdal (Jones 227, 23-25; 228, 1-2). has consistently been on these medications and takes the required dosages at home (Jones 228, 10-11).

10. started talking approximately two years ago and currently has an estimated vocabulary of about 80 words. His reading is very limited and he can he can count to three or four. He cannot do addition or subtraction (Jones 229, 3-23).

11. exhibits self-injurious behaviors such as hitting his head with his fist and beating his head against the wall. , wears a helmet at school (Jones 233, 1-25; 234, 2).

Injuries Sustained and Described by Ms. Davidson

12. At approximately a.m. on October 15, 2009, struck Ms. Davidson on the head four times with his closed fist. (Davidson 24, 17-23; 25, 11-12; 32, 5-7; 33, 23-25).

13. Ms. Davidson felt immediate pain and experienced headache, blurred vision, and was unable to focus her eyes. (Davidson 25, 15-16; 41, 9-11).

14. Ms. Davidson was scared after hit her. (Davidson 47, 1-5).

15. When asked by the Guardian's legal counsel to describe her pain experience on a scale of 1 to 10 with 10 being the most severe, Ms. Davidson rated the October attack as seven. (Davidson 30, 10-12).

16. Ms. Davidson describes all of 's prior attacks, including the one which caused her a concussion, as far less severe than the one she endured October 15, 2009. (Davidson 50, 12-14).

17. Ms. Davidson proceeded to walk, unassisted, to the nurse's office. (Davidson 25, 20-25; 26, 1-2).

18. Ms. Davidson, sought assistance from Ms. Sherri Kirby, the school nurse and RN.

(Davidson 25, 15-22; Kirby 143, 9-10).

19. When Ms. Davidson arrived in Nurse Kirby's office, she had a red knot on her forehead and was experiencing dizziness and disorientation. (Kirby 144., 4-12; 145, 1. 21).

20. Ms. Davidson explained to Nurse Kirby that she could not focus her eyes. (Davidson 26, 3-7). Ms. Kirby determined that her eyes were not reacting to the light. (Davidson 26, 8). (School District Exhibit No. 2).

21. Ms. Davidson was told that she was "shaking" but she does not have independent recollection of that fact. (Davidson 26, 21-24).

22. Ms. Davidson was conscious and able to speak to the ambulance drivers when they arrived. (Davidson 26, 22-23; Kirby 147, 1).

23. When the EMT's arrived a few minutes later, Ms. Davidson complained of head pain, neck pain, headaches, and dizziness. (Kirby 149, 15-20).

Ms. Davidson

24. was taken to : Hospital by ambulance and admitted to the emergency room. (Davidson 28, 5-9). Hospital staff checked her eyes and checked for a bump on her head. (Davidson 28, 10-12).

25. Ms. Davidson's injuries did not require any type of diagnostic testing such as a CAT scan, MRI or x-ray. (Davidson 28, 15-19).

26. Ms. Davidson was not diagnosed with a concussion by the staff at Hospital. (Davidson 51, 1-5).

27. Ms. Davidson was not administered any medication while in the emergency room. (Davidson 28, 20„23).

28. Ms. Davidson was only kept at the hospital for an hour to an hour and a half. (Davidson 28, 24-25; 29, 1-2).

29. Ms. Davidson was not given a prescription for any medications. (Davidson 29, 5-7).

30. Ms. Davidson was discharged with the following instructions: "Well, they told me to take Advil for my headache and if it didn't go away then to come back. Or, if I had any other problems to come back." (Davidson 29, 10-13)

31. The Advil worked. (Davidson 29, 14-15).

32. Ms. Davidson did not feel that there was a substantial risk that she was going to die. (Davidson 30, 3-6).

33. Ms. Davidson stated that her head hurt, but on a scale of 1-10, her pain was a 7. (Davidson 30, 7 - 12).

34, This was not the worst pain she had experienced in her life. (Davidson 49, 1722).

Ms. Davidson

35. Ms. Davidson was less concerned about the pain than she was about her eyes not focusing. (Davidson 30, 7-9).

36. Ms. Davidson did not suffer any kind of obvious disfigurement or permanent injury. (Davidson 30, 13-16).

37, Ms. Davidson has no scars from the incident. (Davidson 30, 17-18).

38. has no continuing medical conditions or effects from the bump on the head. (Davidson, 30, 19-21).

39. Ms. Davidson has no permanent impairment of any kind to her body or organs and she did not suffer any kind of memory loss or loss of any other kind of mental function.

(Davidson 30, 13-25; 31, 1-2).

40. Ms. Davidson's blurry vision was cleared up by the time she left the hospital an hour to an hour and a half later. (Davidson 40, 18-20).

41. The headache lasted the day of the incident, when Ms. Davidson woke up the next morning, the headache was gone. (Davidson 40, 9-10).

42. Ms. Davidson returned to work the following day. (Davidson 29, 16-17).

Documentation of Ms. Davidson's Injuries

43. Exhibit 2, Question 10 reads: "Describe in detail the nature and extent of injury, indicate part of body involved" and Ms. Kirby's description of the incident was as follows:

"He hit her on top of the head, complaining of tingling in her forehead, pupils not reactive to light, oriented (Kirby 150, 14-17). This is the only documentation of the incident provided by the District.

44. "Oriented means that Ms. Davidson was conscious and could answer what her name was, what today was and where she was when questioned. (Kirby 150, 18-21).

45, Exhibit #1 is Ms. D'S Discharge Instructions from Medical

Ms. Davidson

Center. It states her visit in the ER began 10/15/09, at 10:47, and ended 10/15/09, at 11:35. The instructions are for adult head injuries, and lists, on the second page, "THESE MINOR SYMPTOMS MAY BE SEEN AFTER DISCHARGE: memory difficulties, double vision, tiredness, dizziness, hearing difficulties, weakness, headaches, depression, difficulty with concentration. If you experience any of these problems you should not be alarmed. A bruise on the brain (concussion) requires a few days for recovery. This is the same as a bruise elsewhere on the body. Many patients with head injuries frequently experience such symptoms. Usually, these problems disappear without medical care. If symptoms last for more than one day, notify your caregiver." (Emphasis added.)

Injuries to Described and Perceived by Staff on scene

46. Ms. Kirby is the school nurse. (Kirby 143, 7).

47. Ms. Davidson was not bleeding. (Kirby 146, 12-13).

48. Ms. Kirby did not take Ms. Davidson's vital signs (pulse or blood pressure). (Kirby 184, 8-11).

49. Ms. Kirby stated that Ms. Davidson lost consciousness for maybe 30, 45 seconds, but at the same time states that Ms. Davidson would "rouse up'* and keep saying, "what's wrong with me, what's wrong with me. (Kirby 146, 6-11).

50. Ms. Davidson was able to explain what happened to Ms. Kirby. (Kirby 146, 1820).

51. Ms. Davidson spoke to the ambulance drivers in detail telling them "what was going on with her" such as feeling funny, her memory being a little weird and being disoriented. (Kirby 147, 1-6).

52. The ambulance drivers arrived within 2 Y2 minutes after being called and Ms. Davidson was only in Ms. Kirby's office for about 20 minutes. (Kirby 146, 21-25; 149, 7-12).

53. Ms. Davidson did not describe her pain as "excruciating" to the ambulance drivers. She only complained of pain in her neck, back, having a headache and dizziness.
(Kirby 149, 16-19).

54. Ms. Kirby neglected to include any of Ms. Davidson's alleged, more serious symptoms in her report (Exhibit 2) such as her losing consciousness, dizziness, or disorientation. She does not know why. (Kirby 151, 18-23).

55. Ms. Kirby did not report any details regarding Ms. Davidson's alleged injuries at any subsequent school meetings. (Kirby 154, 1).

56, Ms. Kirby did not confirm that Ms. Davidson had any convulsions when testifying:

WYNN (Q): You said she had convulsions?

KIRBY(A): Well, she was kind of — you know, she was shaking and she was putting her head back and rolling her eyes and saying I can't remember — what's happening, what's happening to me, kind of like that. (Kirby 163, 3-8).

57. Ms. Davidson did not return to Ms. Kirby's office to complain of any continuing symptoms after the incident. (Kirby 177, 14-20).

58. Principal , one of the first District employees on the scene states:

(Huerta) Q. To your knowledge, did Ms. Davidson lose consciousness?

A. No. To my knowledge, she did not lose consciousness. (Coleman 73-74, 2125 and 1-3).

59. "She was "zoned" but she could hear me and she could nod that she could hear me..." (Coleman 74, 1-8).

Manifestation Determination Meeting — October 20, 2009

60. A manifestation hearing was held pursuant to K.S.A, 72-991a on October 20, 2009, and guardian, participated by telephone. (Coleman 91, 5-14; School District Exhibit 4). At the manifestation determination, the school district was presented

"information" on serious bodily injury before making its recommendations. (Coleman 63, 22-25;

61. A witness for the school testified that she believed the Team read a definition of serious bodily injury but does not recall the definition. (Coleman 63, 22-25; 64, 1-3).

62. In the manifestation determination meeting held on October 20, 2009, the manifestation determination team concluded that the behavior in question was a manifestation of his disability. (Colvin 119, 13-15; Exhibit 4).

63. The IEP team decided to provide interim alternative educational services to during the suspension in the form of homebound services beginning with 30 minutes per day with the plan to increase services based upon 's adjustment to the changes, as well as two 30 minute sessions of music therapy and two 15 minute sessions of speech. (Colvin 120, 7-11; 130, 1-10; 137, 1-10).

64. No additional evidence was presented to the manifestation determination team in regards to the injuries sustained by Ms. Davidson. (Coleman 74, 13-18). (Kubler 195, 1-2).

(Jones 235, 6-9).

65. There was no discussion during the manifestation determination meeting about what qualifies as "serious bodily injury/' (Colvin 126, 13-21; Kubler 194, 21-23).

66. The manifestation determination team recommended that . receive 30 minutes of special education a day and that his related services would be provided twice during the duration of the suspension. (Colvin 120, 7-11).

67. There was a "little bit" of Team discussion about . going from 325 minutes a day to approximately 21 minutes a day. (Colvin 129, 16-19).

68. The Team talked about the fact that it was going to be a big transition for I given that it [services] would be in a truck with a service provider who [.) is not familiar with and that it was probably always going to be 30 minutes [of services] but that . might get that service three or four different times a day. (Colvin 129, 16-25; 130, 1-4).

69. The thirty minutes would be broken down to seven minutes of work, three minutes of break and so on for the required time. (Colvin 121, 1-4).

70. This was going to be a dramatic transition for . since the services would be provided in a truck with a service provider that . did not know. (Colvin 129, 21-23). When asked if . had difficulty with transitions, Ms. Colvin replied, "absolutely." (Colvin 130, 5-7).

71. The team had no idea how . . was going to respond to the truck: "we did not know how he would respond to just the whole dynamic of that enclosed space and the limited materials that he would have available to him." (Colvin 134, 24-25; 135, 1-2).

72. Before his suspension, .[1] . was in a self contained classroom receiving roughly 325 minutes a day of special education minutes. (Colvin 129, 5). . was also getting 30 minutes a week of speech, 30 minutes a week of occupational therapy and 15 minutes a week of music therapy. (Colvin 136, 12-15). There are seven other children in his class and he has adult support throughout his entire day. (Colvin 133, 1-14). That number was based on his level of functioning, his IEP goals and what was needed to make progress on those goals.
(Colvin 128, 4-16).

73. There were no alternative placements discussed at the manifestation determination meeting other than homebound. (Colvin 130, 12-15).

74. Ms. , did not agree that . should be suspended for 45 days since she heard at the meeting that said it was just a "conk on the head." (Jones 232, 3-9).

s. ,expressed her concern that the 30 minutes would not be adequate to address .'s needs. (Colvin 138, 18-24).

Since the Suspension on October 15, 2009

76. A long term suspension hearing was held pursuant to to K.S.A. 79-8901 & -8902 on October 22, 2009 where . was suspended for 45 days. (Coleman 70, 12-15).

77. The District did not attempt to coordinate an appropriate time for , to receive his homebound services. Ms. . works for the District as an intervention math teacher at

from 8am to 4pm. (Jones 235, 17-25; 236, 1-11).

78. The District did not attempt to coordinate with Ms. — the only one with educational decision making authority over - any additional times or options for the homebound services. (Shaw 291, 1-6).

79. Ms. admitted that the District is sending the homebound truck to Ms. 'house when they know for a fact that Ms. is not at home. (Shaw 291, 6-10).

80. The District has not offered any kind of behavioral intervention or behavioral training to help prepare to return to school. (Jones 240, 11-15).

81. has regressed since he has been home, he is throwing more tantrums, is less outgoing, not has happy and less playful. (Jones 261, 21-25; 262, 1-6).

82. 's depression has deepened since being out of school since "he can't understand why he can't get on the bus." (Jones, 228, 16-19). As a result, his Zoloft dosage was increased by his doctor on Thursday, December 3, 2009 because of his increased depression. (Jones 228, 12-15).

83. Ms. . claims that the District is exploring other placement options while is suspended, but this is being done without any conversation with Ms. as the educational guardian or Ms. as the contact. Ms. has not signed any releases; therefore any conversations with possible placements are extremely limited since no personally identifiable information can be released. (Shaw 276, 4-9).

84. Ms. Colvin confirmed that alternate placements had been requested several times before, but there was still no communication with Ms. . (Colvin 132, 14-21).

85. More disturbing is that Ms. began researching alternate placements as far back as August of 2008 and March of 2009 — and still there has been no collaboration on this point with Ms. . (Shaw 277, 5-6; 278, 22-24).

86. Since the long term suspension hearing, there has been no modification of .'s behavior plan. (Shaw 287, 15-25).

87. 's IEP has not been amended to reflect the unilateral change in placement or the change of service minutes in both special education and his related services. (Shaw 294, 415).

88. , returned to his prior placement at School on January 4, 2010 (Brief of Respondent, p.2, f.l).

DECISION OF THE REVIEW OFFICER

The Reviewing Officer has carefully reviewed the Hearing Officer's Decision, the transcripts, exhibits, legal authorities and the parties' Proposed Findings of Fact and Conclusions of Law. Substantial competent evidence exists in the record, that when viewed as a whole, that supports the Findings and Conclusions adopted by the Hearing Officer. The Findings are significantly detailed and referenced to the record so as to allow the Reviewing Officer to conclude that no mere conclusory statements have been substituted for Findings of Fact. The adopted Findings of the Hearing Officer are complete with detail containing a comprehensive factual history and evidentiary summary.

1. WHETHER THE 45-DAY SUSPENSION OF . WAS JUSTIFIED UNDER THE STATUTORY DEFINITION OF SERIOUS BODILY INJURY.

The Review Officer will first turn to whether the 45-day suspension of was justified under the statutory definition of serious bodily injury. For its part, the Respondent strenuously maintains that the Hearing Officer applied the wrong legal standard in concluding that the 45day suspension was not justified. The Respondent suggests that when considering Ms.

Davidson's injuries, and the serious nature of a head injury in general, her attack clearly demonstrated "serious head injury" as contemplated by 42 U.S.C. §1365. Respondent maintains that the facts in this case are particularly compelling in a public school where safety for students and faculty are paramount.

Petitioner argues that the Hearing Officer correctly determined that the injuries sustained by Ms, Davidson did not meet the statutory definition for "serious bodily injury" and, therefore, the 45-day suspension was not justified.

Petitioner maintains that under the Individuals with Disabilities Education Act ("IDEA'), there are only three "special circumstances" where school personnel may remove a student to an interim alternative educational setting (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.

These special circumstances occur when a student:

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(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. (emphasis added) 20 USC 1415 (k)(1)(G)(i)-(iii) and 34 CFR 300.530 (g)).

To avoid any confusion as to the definition of "serious bodily injury" the federal regulations state that:

(3) Serious bodily injury has the meaning given the term serious bodily injury under paragraph (3) of subsection 1365 of Title 18, United States Code. 34 C.F.R. 300.530(i)(3).

Section 1365(h) of Title 18 of the United States Code provides as follows:

(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 (18 U.S.C., Section 1365(h)(3)).

Petitioner asserts that "serious" means "serious," and that the United States Code makes the following exclusions from the definition:

Serious bodily injury is not:

(A) a cut, abrasion, bruise, burn, or disfigurement;
(B) physical pain;

(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. Section 1365(h)(4).

Petitioner suggests that this definition is entirely consistent with the Kansas Statutes. K.S.A. 72-991(a) states that "serious bodily injury" means an injury as described in subsection(h)(3) of Section 1365 of title 18 of the United States Code. K.S.A. 72-991(g)(h) states

"Serious bodily injury means a bodily injury that involves one or more of the following: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty!' (K.s.A.72-991(

Petitioner further suggests that it is clear from the first-hand testimony of Ms. Davidson and the exhibits presented that Ms. Davidson's injuries do not rise to the level required by the definition above. Her injury did not involve a substantial risk of death, protracted and obvious disfigurement or protracted loss or impairment of the various listed bodily functions. These specific findings resulting from questions aligned directly with the definition are further supported by her credible reporting that she did not require any diagnostic testing at the hospital, did not sustain a concussion, was only at the hospital for an hour to an hour and a half, her blurry vision cleared up by the time she left the hospital and she was able to return to work the next day—with no continuing symptoms.

Petitioner suggests that Ms. Davidson also did not experience "extreme physical pain." Petitioner argues that Ms. Davidson testified that on a scale of 1-10, her pain was only a 7, and that this was not the most severe pain she had ever experienced. Petitioner maintains that, indeed, Ms. Davidson was less concerned about the pain than she was about her eyes not focusing. Her pain is described as "tingling" in Exhibit 2. Ms. Davidson was not prescribed any medication for pain by Hospital. Instead, she was told by hospital to take Advil for her "headache." Her headache was successfully relieved overnight.

When she returned to work the next day, she was pain-free.

Finally, Petitioner suggests that none of Ms. Davidson's injuries involve a substantial risk of death, extreme pain, protracted and obvious disfigurement or protracted loss or impairment of various listed bodily functions. Rather, the injuries fall under categories of what is not considered serious bodily injury pursuant to 18 USC. §1365(h)(4).

In her decision, the Hearing Officer reported that after Ms. Davidson left the classroom and walked unassisted to the nurse's office, she reported dizziness, confusion, weird memory, blurred vision, numbness, distress and pain in her head, neck and back. The Hearing Officer determined that Ms. Davidson was able to answer the school principal's questions and could describe her symptoms to the EMT's. The Hearing Officer found that Ms. Davidson was under observation in the ER for only a short time—2 ^{1}/2 hours—was given no tests, no pain medication, and was sent home soon after her vision cleared. The Hearing Officer noted that Ms. Davidson's discharge instructions from Medical Center stated, among other things, that "many patients with head injuries frequently experience such symptoms. Usually these problems disappear without medical care." The Hearing Officer further determined that after taking the recommended Advil, Ms. Davidson's headaches broke in the night and she was back at work the next day.

The Hearing Officer cited two (2) cases supporting her ultimate decision that Ms. Davidson's injuries did not meet the statutory definition of serious bodily injury. The first decision, U.S. v. Jordan, 331, Fed. Appx. 696, an unpublished opinion of the 11th Circuit

U.S. Court of Appeals, found that the standard was met with the victim was struck in the face and that one blow knocked the victim down, split his lip in half, chipped a tooth, and injured three distinct layers of sensitive nerve endings in the lip, resulting in permanent numbness. The victim in that matter rated the pain at 8 on a scale of 1-10 and was given the strongest pain medication available.

The second case, U.S. v. Tsosle, 288 Fed. Appx. 496, an unpublished opinion of the 10th Circuit U.S. Court of Appeals, the standard was met when four (4) perpetrators set upon the victim armed with rocks and a baseball bat. The Hearing Officer noted that the victim was hit a number of times, the most serious blow was when a large rock was smashed into his head, knocking him out. The victim suffered a bruised skull, serious nose fracture and back injuries.

The Hearing Officer specifically determined that the Jordan matter involved permanent disfigurement and protracted impairment of the function of a bodily member as well as extreme physical pain, due to the split lip and chipped tooth. The Hearing Officer further noted that the Tsosie decision did not clarify the duration or permanence of the victim's injuries but, under the facts presented, the Hearing Officer found it "fairly easy" to infer that the victim in that matter did suffer extreme physical pain. The Hearing Officer found that "what these cases do make clear is that common, minor symptoms from four knuckle wraps to the head by a small child, no matter the enlargement of his knuckles, while without doubt very uncomfortable, did not qualify as extreme physical pain under 18 U.S.C. §1365(h). Consequently, it is obvious that the District misconstrued what constitutes serious bodily injury under 34 C.F.R. 300-530(g)(3).
It follows, therefore, that the 45-day suspension of [ ] was improper."

The Hearing Officer's decision to hold for the parent is further supported by court and hearing decisions interpreting serious bodily injury under 18 U.S.C. 1365(h) submitted by

Petitioner to the Review Officer. In U.S. v, Alexander, 447 F. 3d 1290 (10th Cir., 2006) the court concluded that a jury may find serious bodily injury if any one of the following facts are shown:
(1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a bodily member,

organ, or mental faculty. 18 U.S.C, § 1365; see 18 U.S.C. § 113(b)(2) (referring to § 1365 for the definition of "serious bodily injury").

Testimony at the Alexander trial revealed the following facts: (1) Howell, upon his arrival at the hospital, was deemed in serious condition; (2) Howell experienced severe pain both immediately after the attack and at the hospital; (3) Howell lost copious amounts of blood; (4) Howell suffered multiple, severe lacerations, including one measuring two and one-half inches in length, which all required medical staples to repair; (5) Howell experienced dizziness for a number of days following the attack; and (6) Howell was hospitalized for two days in order for doctors to monitor whether the attack caused any swelling within his brain. This evidence was

more than adequate for the jury to find that Howell suffered "serious bodily injury." Id. at 1300. Thus the decision was affirmed.

In U.S. v. Bruce, 458 F. 3d 1157 (10th Cir. 2006) the jury was specifically instructed, in line with the statutory definition, that to find Long suffered serious bodily injury, the assault must have resulted in: (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. §§ 113(b)(2), 1365(h)(3). Doctor Bhatia specifically testified as follows: (1) it was his reasoned medical opinion that the laceration to Long's forehead was life-threatening because of the possibility Long could have bled to death; (2) Long was in such extreme pain that she had to be given strong, narcotic painkillers; and (3) it was his reasoned medical opinion that the scar on Long's forehead was life-long.

As further justification of the Hearing Officer's analysis, Petitioner cites several Hearing Officer decisions in other jurisdictions reviewing questions of serious bodily injury. In each case, the Hearing Officer found that certain aggressive acts on the part of a student did not rise to the level of serious bodily injury.

In Student with a Disability v. West Virginia State Educational Agency, 108 1-RP 45824, the Hearing Officer found that the actions of a 10-year old 4th grade student who had kicked the teacher's shins and brought the heel of his shoe down across the teachers toes did not meet the standard.

In Tehachapi Unified School District v. California State Agency, 106 1-RP 22450 (2006), a student engaged in two acts of violence resulting in one student receiving a concussion and another who was punched in the nose. The Hearing Officer determined that neither injury involved serious bodily injury.

In El Paso County School District 11 v. California State Education Agency, 107 1-RP 33382 (2007), an incident escalated to the point where a student assaulted district, administrative and security personnel, bit one staff member on the arm, causing injury. Documents submitted by the District did not establish that the injury fell within the definition of serious bodily injury.

In Pocono Mountain School District v. Pennsylvania State Educational Agency, 109 1-RP

26432 (2008), the student followed another into the lavatory, kicking and punching the other student several times, breaking the other student's nose. Although the Hearing Officer stated that the student's behavior was "injurious, frightening and intimidating," a broken nose was not found to fit under the definition of serious bodily injury. In a footnote, the Hearing Officer in

Pocono stated that "for what it's worth, I note that a unilateral IAES is an extraordinary governmental power that deprives disabled children of the pendency protection usually associated with most other disputed changes and placements. Apparently, Congress intended this power only to be used in the most egregious circumstances." Id. at 26438.

The Review Officer is not insensitive to the fact that Respondent undoubtedly believes that Ms. Davidson's injuries were traumatic, painful and significant. The Hearing Officer, however, after reviewing the evidence apparently did not believe that Ms. Davidson suffered extreme physical pain. The Hearing Officer stated: "...that common, minor symptoms from four knuckle wraps to the head by a small child, no matter the enlargement of his knuckles, while without doubt very uncomfortable, do not quality as extreme physical pain under 18

U.S.C. §1365(h)." The Review Officer cannot substitute his judgment for what Respondent believes should be the law. The Review Officer can only review the law as it has been interpreted by the courts and other knowledgeable professionals. Accordingly, the Review Officer finds that

the Hearing Officer correctly determined that the 45-day suspension of .was not justified under the statutory definitions of serious bodily injury.

11. WHETHER THE INTERIM ALTERNATIVE EDUCATIONAL SETTING AND PROPOSED HOMEBOUND SERVICES WERE ADEQUATE AND WHETHER COMPULSORY EDUCATION WAS APPROPRIATE.

Next, the Respondent's raise a number of questions for the Review Officer's determination, as follows:

A. Whether the hearing officer had authority to award compensatory education?

B. Whether met his burden of proof to establish that his interim alternative services were inappropriate?

c. Whether . waived any claim for compensatory education when the interim alternative services were refused?

1. Whether compensatory education awarded was excessive?
2. Whether the Hearing Officer erred in concluding that the 45-day suspension was not justified?

The Hearing Officer opined in her decision that it could not be known whether the District's proposed home-bound services would have proven to be appropriate since the services as planned would have expanded as the student adjusted to changes involved in providing them, and the services were refused. The Hearing Officer stated that, in her opinion, it was "highly unlikely that the proposed services would have proven adequate, since children such as [.] are usually highly resistant to change. If [. J could not adjust to the global change to his proposed educational experience inherent in the District's homebound service plan, meaning the services state 30 minutes a day, then certainly 30 minutes a day could not reasonably be an appropriate substitute for a full-days schooling." The Hearing Officer further directed that . be returned to his former classroom placement. Further, "due to District's inappropriate suspension, student has lost 45 days of educational services and the district is hereby ordered to provide 45-days compulsory education to him."

The Respondent argues that the Hearing Officer lacked authority to award compensatory education. The Respondent maintains that K.S.A. 72-993 and 20 U.S.C. §1415(k)(4)(A) required .. to remain in the interim placement pending the decision of the Hearing Officer. Further, the Hearing Officer expressly held that the interim alternative educational placement setting and proposed homebound services were adequate. Therefore, Respondent

maintains that the Hearing Officer had no authority to order any compensatory education, stating:

> "Appeal was sought on behalf of . in this matter pursuant to K.S.A. 72992a. See also 20 U.S.C. § 1415(k)(3)(A). The Hearing Officer's authority under this statute is limited to four (4) options: (1) uphold the manifestation determination; (2) uphold the interim alternative educational placement of the child; (3) return the child to the placement from which the child was removed; or (4) order a change in placement of the child 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 others. The Hearing Officer ordered . to "be returned to his former classroom placement." Decision, p. 9. No provision for the award of compensatory education in the context of this type of interim change of placement for disciplinary reasons appears anywhere in the statute. Accordingly, the Hearing Officer had no authority to grant such relief. See K.S.A. 72-.992a; 20 U.S.C. §1415(k)(

In addition, Respondent argues that as no evidence whatsoever was presented during the due process hearing that the services were not appropriate for As a result, the Hearing Officer had no basis to speculate that had the "parent" allowed these services to be provided, they might not have been appropriate and that, therefore, compulsory education should be ordered.

Further, Respondent further maintains it is not equitable to require the District to provide compensatory education for. when 's "parent" refused to accept the educational services offered by the District which, in the District's opinion, were reasonably calculated to enable him to receive educational benefit. Having failed to accept the services deemed by the IEP Team to be appropriate, Respondent maintains that . cannot now recover in equity compensatory educational services to compensate for those services he refused.

Finally, the Respondent suggests that, at a minimum, any compulsory education should be reduced because the Hearing Officer rendered her decision in less than 45 days and that, in the interim, . returned to his prior placement upon his return to school following District's winter break. The District argues that no compensatory education can or should be awarded for the first ten (10) days of the suspension period, running from October 16, 2009, through November 2, 2009. Thus, the District calculates that, at most, i. "missed" only 31 school days

(six (6) of which were early dismissal days) as a result of the determination to suspend him for 45 days on October 22, 2009.

Petitioner argues that the Hearing Officer found that the interim alternative educational setting proposed homebound services were adequate, only because parent and foster mother's refusal to accept the proffered services. Petitioner maintains that the parent not accepting the services has no bearing on the compulsory education award based on the improper suspension. Petitioner maintains that had . not been improperly removed, the parents would not have been in a position to accept or decline homebound services.

The Hearing Officer found that it was "highly unlikely" that the proposed services would have proven adequate. There is ample evidence in the record to support this conclusion. The record reveals that:

Thati.'s educational opportunities would be reduced from 325 minutes per day to approximately 21 minutes per day;

(2) . would receive only a maximum of 30 minutes of special education a day;

(3) The 30 minutes would be broken down to 7 minutes of work, 3 minutes of break, and so on for the required time;

(4) It was going to be a dramatic transition for . since the service would be provided in a truck with a service provider that . did not know;

Thati. had difficulty with transitions;

(6) The Team had no idea how was going to respond to the truck;

(7) That no alternative placements were discussed at the manifestation determination;

(8) That the District did not offer any kind of behavioral intervention or behavioral training to prepare for . 's return to school;

That. has regressed since he has been home;

(10) That .'s depression has deepened, and

(11).'s Zoloft dosage was increased by his doctor on December 3, 2009, because of his increased depression.

The record is less clear whether the parent failed to accept services in behalf of

The record suggests that the District did not attempt to coordinate an appropriate time for . to receive his homebound services from either his foster mother or his

parent. This is important because .'s foster mother works for the District as an intervention math teacher from 8:00
a.m. to 4:00 p.m. Nor does it appear that the District attempted to coordinate with Ms.
-
any additional times or options for homebound services. There is some testimony to indicate that the District sent the homebound truck to Ms. 's house during periods of time they knew that Ms. was not at home.

Despite any confusion whether or not .'s grandmother or foster parent may or may not have been cooperating with the District, the Hearing Officer's order clearly states that "due to the District's inappropriate suspension, the student has lost 45 days of educational services,
and the District is hereby ordered to provide 45-days compensatory education to him." It was clearly the intent of the Hearing Officer not to waive any rights or penalize due to any alleged communication deficiencies between parent, foster mother, and the school district. The Review Officer is in accord with this perceived Hearing Officer philosophy and believes that if the District feels that the surrogate parents are not fully cooperative with the decisions of the IEP team, it should actively discuss and communicate with the surrogate parents the proposed program or suggest an alternative educational placement. The District's scheme to provide a truck and service provider for such a limited period of time without coordination and cooperation from the surrogate parents may well have been considered by the Hearing Officer as little more than a sham or punitive educational placement.

The District is correct in pointing out that compulsory education is not a remedy expressly identified in the IDEA. However, had Congress wished to eliminate this important remedy, Congress has had ample opportunity to do so.

Petitioner correctly points out that Hearing Officers can appropriately award compensatory education in appropriate circumstances by exercising their authority to "grant such relief as the Court determines appropriate." 20 USC. S1415(i)(2)(C)(iii); 34 C.F,R. 300.516(c)(3). The Petitioner is also correct in pointing out that compensatory education had been supported by case law since at least 1985 when the US. Supreme Court in Burlington

School Community v. Massachusetts Department of Education, 108 S, Ct. 1996, 556 IDELR 389,

p. 5, recognized judicial authority to grant retroactive reimbursement.

Lower courts have extended the Burlington analysis to include compensatory education as a type of "IDEA-sanctioned appropriate relief." See Meiner v. State of Missouri, 558 IDELR

123 (8th Cir. 1986); Draper v. Atlanta Independent School System, 518 F,3d 1275 (11 th Cir., 2008); Forest Grove School District v. T.A. 129. S. ct. 2484, 52 IDELR 151 (2009). For example, in Mary McLeod Bethune Day Academy Pub. Sch. v. Bland, ex rel T.B., 555 F.Supp. 2d 130 (U.S. Dist. Ct. DC, 2008), the U.S. District Court, District of Columbia, upheld a Hearing Officer's determination that a child with a disability was entitled to an hour-for-hour award of compensatory education when given the child's significance deficits and unique needs. The District Court observed that the Hearing Officer had sufficient information about the student's

needs to craft an award that was reasonably calculated to compensate the student for the charter schools FAPE violation.

Finally, there is nothing in the Hearing Officer's decision which would give credence to reducing the Hearing Officer's independent determination that . should receive anything less than 45-days compensatory education. There is ample evidence in the record to indicate that the District's homebound educational plan was only minimal. It is questionable whether the plan was calculated to provide any educational benefit toIn any event, the Hearing Officer has had the additional advantage of weighing the credibility of the witnesses who appeared before her.

The Review Officer must give deference to the Hearing Officer's determination. The Respondent has not met its burden of proof that any aspect of the Hearing Officer's determination should be set aside. After reviewing all of the facts and circumstances in this case, the Reviewing Officer will not second guess or substitute his judgment for the Hearing Officer's determination. Nor should the child be denied a free and appropriate public education because the parent and/or foster parent may or may not, have fully cooperated or accepted the limited services offered by the District.

CONCLUSION

The Review Officer finds:

1. That the 45-day suspension of was unjustified under the statutory definition of serious bodily injury as contemplated by 42 U.S.C. §1365.

2. That the proposed interim alternative educational setting and homebound services were likely inadequate.

3. That the parent and foster mother's refusal to accept proffered services is inconclusive.

4. That the Hearing Officer had authority to award compensatory education.

5. That there was no waiver of any claim for compensatory education.

6. That the compensatory education was not excessive.

RIGHT TO APPEAL

The parties are hereby notified that an appeal from this decision may be perfected by the filing of a Petition for Judicial Review under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (K,S.A. 77-601 et seq.) within 30 days of the service of this report, or to an action in federal court as allowed by the federal law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Pre-Review Conference Order should and does become the Order of the Review Officer this 26th day of February, 2010,

IT SO ORDERED.

La y R. ute
Review Officer

CERTIFICATE OF MAILING

I, Larry Rute, hereby certify that I have served a true and correct copy of the foregoing Pre-Review Conference Order upon the following:

Ms. Nancy E. Huerta
Via e-mail to: nhuerta@equalchanceeducatino.com

Mr. Deryl W. Wynn
Via e-mail to: dwynn@mvplaw.com And

by mail to:

M. Kevin Ireland, Attorney
Office of General Counsel
Kansas State Department of Education
120 S.E. 10th Street
Topeka, Kansas

Nancy Huerta
Equal Chance Education Consulting, LLC
22052 West 66th street, Suite 186
Shawnee, Kansas 66226-3500

Mr. Deryl W. Wynn
McAnany, Van Cleave & Phillips, PA
707 Minnesota Avenue
P.O. Box 171300
Kansas City, KS 66117

by depositing the same in the United States mail, first class, postage prepaid this 26th day of February, 2010, and via e-mail as shown above this 26th day of February, 2010.

Larry R. Rute