

**NOTICE OF HEARING OFFICER'S DECISION**

**CHILD'S NAME:**

**PARENT'S NAME & ADDRESS:**

**PARENT'S COUNSEL:**

NANCY E. HUERTA  
22052 w. 66<sup>TH</sup> Street, #186  
Shawnee, Kansas 66226

**SCHOOL DISTRICT:**

USD #.

**DISTRICT'S COUNSEL:**

DERYL W. WYNN  
PO Box 171300  
Kansas City, Kansas 66117

**HEARING OFFICER:**

Kathleen Neff  
601 Maple  
Overbrook, Kansas 66524

**DATE:**

December 22, 2009

**RECEIVED**

**DEC 28 2009**

**KSDE**

## BEFORE THE HEARING OFFICER

IN THE EXPEDITED DUE PROCESS HEARING OF:  
and USD #

10 EP 901

; Kansas

The Parent's request for an expedited due process hearing in this matter was received November 12, 2009. The Parent refused to participate in a resolution hearing on November 17, 2009. On December 9, 2009, the expedited hearing in the above-titled matter was held at the LEA offices in , Kansas, before the Hearing Officer, Kathleen Neff. The Parent appeared through the Student's maternal grandmother and authorized educational decision maker, , and was represented by counsel, Nancy E. Huerta. USD # appeared through its authorized representative, Ms. , Director of the Special Education Coop, and was represented by counsel, Deryl W. Wynn. The proceedings were recorded by Court Reporter, Jean Crawford.

## PRELIMINARY MATTERS

The first preliminary matter was whether Ms. had legal authority to proceed in this matter in the parent's stead. Ms. presented three documents to the Hearing Officer, one a notarized statement by the Student's mother, appointing Ms the Student's guardian, dated August 12, 1988, and a Power of Attorney for Educational Decision Making, executed by the Student's mother, and a second notarized statement by the mother, appointing Ms. the Student's guardian, both dated December 3, 2009. Upon reviewing those documents, the Hearing Officer ruled that Ms. had the legal authority to request due process and to proceed in the parent's stead.

Secondly, Parent requested a standing objection to any and all exhibits offered by the District, on the grounds that the District's response to Parent's discovery requests was too late to

allow Parent time to adequately review the documents in preparation for hearing, despite the Hearing Officer's discovery cut-off order in the 12/1/09 teleconference scheduling order and the formal 12/4/09 Amended Scheduling Order. The Hearing Officer noted Parent's standing objection, and overruled it.

### FINDINGS OF FACT

1. On October 15, 2009, during a first hour reading exercise, Student rapped his paraprofessional, Ms. D., four times on the head with his knuckles. (T, pp. 24-25) Student is almost 13, stands 4' 3", and weighs about 83 lbs. (T, p. 227, ls. 20-22) When he was 9 months old, his grandmother (Parent) took charge of him, and raised him to age 5 when, due to her physical disabilities, he was placed with Foster Mother, in a private Medicaid foster placement. (T, pp. 219, 224) He has been in special education for the duration of his school years, and his classroom is self-contained. (T, pp 133, l. 21-134, l. 9) He began talking only two years ago, and has a working vocabulary of about 80 words. He can read some words, and can count to 4. (T, pp. 228-230)

2. Since Student was little, he has slammed his head against walls, floors, school bus windows and other solid objects. He wears a helmet to prevent head injury. He also has bashed his knuckles against hard objects to the point that they are calloused and twice normal size. He tears and scratches at himself, leaving bruises and scars all over his face and arms. He wears gloves to prevent further damage to his knuckles and to stop him from injuring himself. He has a long history of attacking others, and when he is fully escalated two or three adults are needed to physically contain him. (T, pp. 164, l. 4 – 165, l.1)

3. Ms. D. could not focus her eyes after the blows, and, when the problem had lasted several minutes, she notified the teacher, left the classroom, and walked without assistance to the school nurse's office. (T, pp. 24-26, l. 1 & 2)

4. When she arrived at Nurse K's office, the Nurse had to shoo several children out of

the office before she could concentrate on Ms. D. Ms. D complained of dizziness, being unable to focus her eyes, and pain in her head, neck and back. Nurse K shone a light in Ms. D's eyes, and noted her pupils were not reacting to it. After about ten minutes in the Nurse's office, Ms. D became very woozy, swaying in her chair, then became very agitated for some minutes, and may have passed out once for a few seconds. Nurse K notified administration, and Principal C came to the Nurse's office and spoke to Ms. D. Principal C noted that Ms. D was answering her questions, but was "zoned". With Principal C's permission, Nurse K called an ambulance. The EMT's arrived in about three minutes. Later, Nurse K filled out the official accident report, which Principal C signed. (T, pp. 72, 74, 144-147, 149 & District's Exhibit #2)

5. Ms. D answered the EMT's questions, and stated her symptoms. She was transported to the ER, where she was under observation for about an hour or an hour and a half. No scans, MRIs, or Xrays were ordered, nor was she given any pain medication. After the hour and a half, Ms. D's eyes were once again focusing, and she was sent home with orders to take an Advil for her headache, and come back if it didn't go away. (T, pp. 28 & 29, & District's #1)

6. Ms. D's headache went away during the night, (T, p. 40, ls. 9-13) and she was back at work the next day. (T, p. 29, ls. 16 & 17) She suffered no permanent effects from the attack. When asked if she was in extreme physical pain from the attack, she replied that her head hurt, but she was more worried about her eyes not focusing. On a scale of 1 to 10, she felt the pain she suffered was a 7. (T, p. 30) She stated that, although she was aware that Student didn't want to do his work, the attack came out of nowhere, and it scared her. (T, p. 47, ls. 1 - 15)

7. Principal C convened a short-term hearing right after the incident, suspending Student for five days until a manifestation hearing could be held. (T, pp. 106-107)

8. The IEP team met on October 20, 2009, and determined that Student's behavior was a manifestation of his disability, and that he had caused Ms. D. serious bodily injury. It was determined that Student's IEP had been properly implemented, and the behavioral intervention plan was considered, with no proposed modifications. Parent attended by phone, and Foster Mother in person. (T, p. 63, & District's Exhibit #2)

9. Principal C, acting as hearing officer, convened a long-term suspension hearing the day after the IEP team's decision, and suspended Student for 45 days. Parent was present. (T, pp. 68-70)

10. District decided Student's educational services should be homebound, and would consist of 30 minutes per day, located in a mobile classroom, with related services provided once a month, with the services increasing as Student adjusted to the changes in locale, teacher, services and available support. (T, pp 118-121, & District's Exhibit #4)

11. Both Parent and Foster Mother disagreed with the suspension and the offered services. Student was placed in daycare for the suspension period, since Foster Mother was a District employee. Neither Parent nor Foster Mother would cooperate with the provision of the proposed homebound services. (T, pp. 137-139 & 287-292)

### **ISSUES & HOLDINGS**

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 and proposed homebound services were adequate.

Held: For the District, only because of Parent and Foster Mother's refusal to accept proffered services.

### **AUTHORITIES & RATIONALE**

The operative IDEA regulation is 34 CFR 300.530(g)(3), and (i)(3), which reads as follows: "School personnel may remove a student to an interim alternative educational setting without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function...

(3) Serious bodily injury has the meaning given the term “serious bodily injury” under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.”

USC 18 1365(h)(3) states, “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 of impairment of the function of a bodily member, organ or mental faculty.”

After Ms. D was hit in the head by Student, and her vision went blurry, she waited several minutes before leaving the classroom and walking unassisted to the Nurse’s office. She reported dizziness, confusion, weird memory, blurred vision, numbness, distress, and pain in her head, neck and back. Nurse K apparently characterized Ms. D’s more distraught moments as ‘convulsions’ to fellow employees, but carefully backed away from that appellation during her testimony, describing Ms. D’s behavior instead as, at times, highly agitated and, at others, as disoriented. She also testified that Ms. D was speaking during her agitation, asking what was wrong with her, and why was she feeling this way. Nurse K also neglected to include Ms. D’s agitation in her accident report, but did state Ms D was oriented xs 3, i.e., knew where she was, who she was, and what day it was.

Ms. D was able to answer Principal C’s questions, and to describe her symptoms to the EMTs. She was under observation in the ER for a short time—one to one and a half hours, was given no tests, no pain medication, and was sent home as soon as her vision cleared.

Districts Exhibit #1 is Ms. D’s Discharge Instructions from \_\_\_\_\_ Medical 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.) Apparently the instructions were accurate, since, after taking the recommended Advil, Ms. D’s headache broke in the night, and she was back at work the next day.

In U.S. v Jordan, 331 Fed.Appx. 696, an unpublished opinion of the 11<sup>th</sup> Circuit U.S. Court of Appeals, the Court considered the question of whether defendant suffered serious bodily injury as defined in 18 U.S.C. 1365, an element of the offense charged, which was Assault Causing, or Intended to Cause, Great Bodily Harm. Mr. Jordan struck the victim 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 rated the pain an 8 on a scale of one to ten, and was given the strongest pain medication available.

In U.S. v Tsosie, 288 Fed.Appx 496, an unpublished opinion out of the 10<sup>th</sup> Circuit U.S. Court of Appeals, the defendant challenged his convictions for three counts of assault with a dangerous weapon, and one count of assault resulting in serious bodily injury. The defendant and three of his fellow gang members set upon the victim. The defendant and another each had rocks, and a third gang member was armed with a baseball bat. The victim was hit a number of times, but the most serious blow was when a large rock was smashed into his head, knocking him out. Mr. Tsosie hit the victim in the back with a rock as he fell to his knees. The victim suffered a bruised skull, serious nose fracture, and back injuries.

Certainly, Jordan involved permanent disfigurement and loss protracted impairment of the function of a bodily member as well as extreme physical pain, due to the split lip and chipped

tooth. Tsosie does not clarify the duration or permanence of the victim's injuries in that case, but it appears fairly easy to this Hearing Officer to infer he did suffer extreme physical pain.

What these cases do make clear is that common, minor symptoms from four knuckle raps to the head 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). 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 Student was improper.

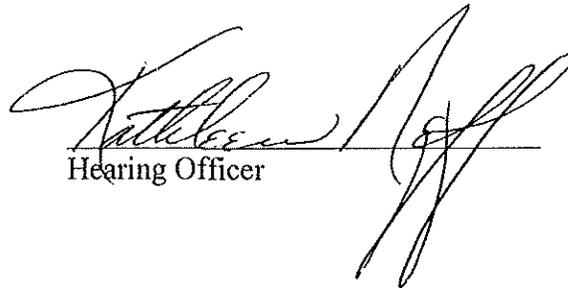
Whether the District's proposed homebound services would have proven to be appropriate cannot be known, since the services as planned would have expanded as Student adjusted to the changes involved in providing them, and the services were refused. This Hearing Officer is of the opinion, however, that it is highly unlikely that the proposed services would have proven adequate, since children such as Student are usually highly resistant to change. If Student could not adjust to the global change to his educational experience inherent in the District's homebound service plan, meaning the services stayed at 30 minutes a day, then certainly 30 minutes a day could not reasonably be an appropriate substitute for a full day's schooling.

## CONCLUSION

The District met all procedural timelines. All proper notices were sent to the Parent. The Student's behavior was properly determined to be a manifestation of his disability. However, while the IEP team did consider the statutory definition of "serious bodily injury" at the manifestation determination hearing, the definitional standards of the term were misconstrued. Consequently, the 45-day suspension of Student was inappropriate. The proposed homebound services, although not implemented due to Parent and Foster Mother's lack of cooperation, were unlikely to have proven adequate

**ORDER**

Student's 45-day suspension is hereby reversed. The Student should be returned to his former classroom placement. Due to District's inappropriate suspension, Student has lost 45 days of educational services, and the District is hereby ordered to provide 45 days of compensatory education to him.

  
Hearing Officer

**CERTIFICATION OF SERVICE**

I certify that on December 22, 2009, the foregoing Hearing Officer's Decision was sent by email and , on December 23, 2009, by registered mail, return receipt requested, to:

Deryl D. Wynn  
McAnany, Van Cleave & Phillips, P.A.  
PO Box 171300  
Kansas City, Kansas 66117  
mvplaw.com

Mark Ward  
State Department of Education  
120 SE 10th  
Topeka, Kansas 66612

Nancy E. Huerta  
Equal Chance Education Consulting  
22052 W. 66<sup>th</sup> Street, #186  
Shawnee, Kansas 66226  
nhuerta@equalchanceeducation.com

  
Kathleen Neff