STATE BOARD OF EDUCATION
STATE OF GEORGIA

TERRY LEE SLOAN, Appellant, vs. DEKALB COUNTY BOARD OF EDUCATION, Appellee.	:	CASE NO. 1978-26

ORDER

After due consideration of the record submitted herein and the Report of the Hearing Officer, attached hereto, and after a vote in open meeting, it is the opinion of this Board that the Findings of Fact made by the Hearing Officer should be adopted by this Board as its findings of fact. This Board, however, does not adopt the conclusions and recommendation made by the Hearing Officer. It is the opinion of this Board that when a student has been evaluated and placed in a special education program, a local board of education is not stripped of its ability to permanently expel the student when the student is involved in an incident which is threatening to himself and other students. If the student has been afforded due process and there is any evidence to support the decision of the local board,

then this Board will not reverse the decision of the local board. It is, therefore,

ORDERED, that the decision of the DeKalb County Board of Education be sustained.

Mrs. Oberdorfer dissents; Mrs. Huseman was not present.

This 9th day of November, 1978.

Thomas K. Vann Jr.

THOMAS K. VANN, JR.
Vice Chairman for Appeals

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TERRY LEE SLOAN, Appellant, vs. DEKALB COUNTY BOARD OF EDUCATION, Appellee.	:	CASE NO. 1978-26 REPORT OF HEARING OFFICER

PART I

SUMMARY OF APPEAL

This is an appeal from a decision by the DeKalb County Board Education (hereinafter "Local Board") to permanently expel Terry Lee Sloan (hereinafter "Appellant") for threatening and intimidating another student with violence during the school day. The appeal claims that the hearing before the Local Board was procedureally defective and that substantive error exists because Appellant is allegedly handicapped and therefore entitled to special education. The Hearing Officer recommends that the decision to expel Appellant be upheld, but that the decision to permanently expel Appellant be reversed.

PART II

FINDINGS OF FACT

On April 7, 1978, Appellant was involved in an incident with a female student which resulted in his being charged with "threatening and intimidating another student with violence

during the school day. . . ." A Student Evidentiary Hearing was conducted and Appellant was expelled. Appellant then requested a hearing before the Local Board. The Local Board held a de novo hearing on May 17, 1978, and on May 18, 1978, it issued its decision to permanently expel Appellant. On June 16, 1978, Appellant filed an appeal with the local superintendant to the State Board of Education.

During the hearing, it was established that Appellant was in a learning disabilities class. At the time of the incident, he was sixteen (16) years old. On April 7, 1978, Appellant's class went out to the playground accompanied by two teachers. The teachers began organizing the students for a game and noted that Appellant and a female student were missing. The two teachers began running toward a cluster of trees located at the edge of the playground. As they neared the cluster, the female student came running out of the cluster to the teachers. When the teachers and the student met, the teachers noted that she appeared frightened and had cuts and scratches on her arms and neck. Appellant then came out of the cluster of trees and was escorted to the principal's office.

The female student testified that Appellant had been her "boyfriend" and the two of them had gone to the cluster of trees. Appellant then pushed her to the ground and when she became frightened, Appellant placed his hand over her mouth. He had also grabbed her by the feet and pulled her down a slight

incline. The female student managed to get away from Appellant when the teachers began approaching. It is not clear from the transcript whether Appellant voluntarily released her or she managed to elude him.

A counsellor who was working with Appellant testified that if Appellant was readmitted to the school, it was "very probable" that he would not be involved in another incident. There was also testimony presented that Appellant had been involved in other previous incidents.

The appeal to the State Board of Education sets forth eleven points of error in the decision and in the conduct of the hearing. The eleven points go the appropriateness of the decision, procedural errors, and errors of law. As hereinafter pointed out, some of the issues were not raised at the initial hearing before the Local Board.

PART III

CONCLUSIONS OF LAW

Appellant complains that the decision of the Local Board was unsupported by and contrary to the facts and the evidence. Appellant contends that the evidence shows that the female student willingly accompanied him to the cluster of trees and did not become frightened until the teachers began approaching. She was a willing participant and her fright was caused by her fear of being caught rather than her fear of Appellant. Appellant also alleged in the appeal that the Local Board failed to

consider the testimony of the counsellor who was treating Appellant; that the school system was derelict in placing Appellant in a situation where he could be involved in an incident, and that the teachers were negligent in permitting him to wander off with the female student.

The record does contain evidence which would support the Local Board's conclusion that Appellant threatened and intimidated the other student. Additionally, there was conflicting testimony concerning whether Appellant would be involved in another incident if he were returned to the classroom. If there is any evidence in the record to support the decision of a local board of education, the State Board will not disturb that decision upon appeal. Antone v. Greene County Board of Education Case No. 1976-11. Appellant did not raise the issues concerning the dereliction of the school system and the negligence of the teachers at the initial hearing. If an issue could have been raised at the initial hearing but was not, then it cannot be raised for the first time on appeal. See, Hobby v. Tift County Board of Education, Case No. 1977-6. The Hearing Officer, therefore, concludes that Appellant's points of error concerning the Local Board's view of the evidence, the dereliction of the school system, the failure to consider the testimony of the counsellor, and the negligence of the teachers are without merit.

The appeal sets forth as procedural errors that (1) the Local Board did not furnish Appellant with a transcript of the Student Evidentiary Hearing; (2) the school system failed to call one of the witnesses that it had informed Appellant would be a witness, and (3) the Local Board improperly admitted inadmissable hearsay testimony. The proceeding before the Local Board was a de novo proceeding. There was not, therefore, any necessity for the Local Board to receive a transcript of the initial review made by the administration to determine if a student should be suspended. Appellant had the opportunity to present any relevant evidence he desired, and to cross examine and rebut any witnesses presented by the school system. Appellant has not cited any authority for the proposition that it is mandatory for the school system to call a witness it has listed in its notice of potential witnesses, and the Hearing Officer concludes that such a requirement is not imposed on the school system. There was also sufficient admissable testimony presented at the hearing to support the decision of the Local Board without resort to hearsay testimony. The Hearing Officer, therefore, concludes that Appellant's assignments of error concerning the failure to furnish a transcript, failure to call a witness, and the admission of hearsay evidence are also without merit.

Appellant also argues that the Local Board improperly used the same discipline criteria for a handicapped student as it would apply to a non-handicapped student. The expulsion of Appellant, therefore, is contrary to the provisions of law

regarding handicapped students, e.g., P.L. 94-142. The record shows that Appellant was in a special education class and had previously been involved in other related incidents. Additionally, during a portion of the time that he was in the special education class, he was transferred to a behavior disorders class It thus appears that Appellant does fall within the definitions of a handicapped student as contemplated by P.L. 94-142 and its associated regulations.

Under the regulations issued pursuant to P.L. 94-142, a child's status during the pendancy of any proceeding is to remain unchanged until there has been a final determination. 42 C.F.R. §121a.513; 42 Fed. Reg. 42496 (Aug. 23, 1977). The comments to the regulation, however, indicate that an educational agency can use its normal procedures for dealing with children who are endangering themselves or others. In the instant case, the Local Board, therefore, could conduct a Student Evidentiary Hearing and determine that Appellant should be suspended from the class he was attending. The Local Board could also determine that Appellant should be suspended. Nevertheless, with the indications that Appellant had both a learning disabilities problem and a behavioral problem, the Hearing Officer is of the opinion that the Local Board cannot institute a permanent suspension of the student based upon a behavior-related incident.

A "seriously emotionally disturbed" child is defined as a child who has an "inability to build or maintain satisfactory

interpersonal relationships with peers and teachers". 45 C.F.R. §121a.5(b)(8)(B); 42 Fed. R. 42478 (Aug. 23, 1977). A handicapped student is given the right to have a hearing in order to have a personalized eductional plan developed that is designed to meet the "unique needs" of the student. It thus appears that a school system is required to make an evaluation of a handicapped student and develop an educational program which will meet the needs of the student. This means that a program has to be devised which will take into consideration the student's emotional problems, including the student's interaction with other student's, and place the student into a setting which will permit the student to obtain an education. Such a result, of course, cannot be obtained if the student is permanently expelled from the school system. It is, therefore, the conclusion of the Hearing Officer that a school system cannot permanently expel a handicapped student on the basis of behavior problems, but instead the school system must devise a program, or make a program available, which takes into consideration the student's needs. This may involve simply removing the student from the regular classroom into a more restrictive setting, or it may involve an institutional setting in some circumstances. Nevertheless, the student may be temporarily expelled for the immediate period of time in order to protect the other students. During this period of time, the school system can conduct the necessary evaluations and determine the proper placement of the student.

PART IV

RECOMMENDATION

Based upon the above findings and conclusions, the record submitted, and the briefs and arguments of counsel, the Hearing Officer is of the opinion that the DeKalb County Board of Education provided Appellant with due process, that its decision to expel was not arbitary and capricious and is supported by the evidence, but that its decision to permanently expel Appellant was erroneous. The Hearing Officer, therefore, recommends that the decision of the DeKalb County Board of Education to expel Appellant be upheld, but that the Appellant be readmitted to the school system upon proper evaluation and placement under the guidelines of P.L. 94-142 and the Georgia Annual Program Plan for Special Education.

L. O. Buckland

L. O. BUCKLAND
Hearing Officer