

**STATE BOARD OF EDUCATION
STATE OF GEORGIA**

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| R.G., | : | |
| | : | |
| Appellant, | : | |
| | : | |
| v. | : | CASE NO. 2008-27 |
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| HENRY COUNTY BOARD | : | DECISION |
| OF EDUCATION, | : | |
| | : | |
| Appellee. | : | |

This is an appeal by R.G. ("Student") from a decision by the Henry County Board of Education ("Local Board") to expel the Student from school commencing October 25, 2007 through the last day of the 2007-2008 school year, with the opportunity to attend an alternative school during the expulsion. Specifically, the Local Board found that the Student engaged in sexual misconduct, entered an unauthorized area of the school, made false statements to school staff, and skipped a portion of two of his classes. The Local Board's decision is sustained in part and reversed and remanded in part.

I. FACTUAL BACKGROUND

On or about October 4, 2007, the Student alleged he was feeling ill and sought a hall pass from his teacher to use the restroom. The Student was issued a hall pass and then proceeded to wander the halls of the school which he had not been authorized to do. The Student met a female friend in the hallway, and then entered the boys' restroom. The Student and the female student remained in the restroom for approximately 30 minutes.

According to Deputy Donald Rawles, several days later the female student went to the hospital and received a rape kit which confirmed she had recently had sexual intercourse. As a result of the female student's actions, the Local Board was notified resulting in it conducting an investigation. The female student told Rawles that she and the Student had sexual intercourse in the boys' restroom. The Student initially told the Local Board that he and the female student went into the restroom because they heard another female crying in the boys' room, who claimed she had been raped. The Student later admitted that the female student told him to tell this story because she realized they may have been seen on the video monitor entering the boys' restroom together. The Student later stated to the school system that he and the female student were in the boys' restroom talking.

II. ERRORS ASSERTED ON APPEAL

A. Due Process - same hearing officer.

The Student asserts that his due process rights were violated because the same hearing officer considered his case after hearing the female student's case. The issue of a tribunal hearing two similar cases has recently been addressed and upheld by this Board. See Beal-Parker v. DeKalb Cnty. Bd. of Educ., Case No. 2008-17 (Ga. SBE, Feb. 14, 2008).

The Student further asserts that the Local Board violated its own rules by assigning the same hearing officer. The Local Board policy states: "The Disciplinary Hearing Officer will not be allowed to hear any case in which said officer has advance knowledge of the facts and circumstances of the case." Henry County Board Policy JCEB(A). The Local Board contends that this policy was not violated in that it only means that advanced knowledge means personal knowledge of the circumstances as opposed to knowledge gained in his or her capacity as a hearing officer in other matters. Based upon the language of this rule, and the analysis set forth in Beal-Parker, this Board agrees. Thus, the Local Board did not err by using the same hearing officer.

B. Hearsay Evidence.

The Student asserts that the hearing officer relied upon evidence from the hearing of the female student or hearsay evidence in concluding that the Student engaged in sexual misconduct. The Local Board has the burden of proof when it charges a student with an infraction of its rules. Scott G. v. DeKalb Cnty. Bd. of Educ., Case No. 1988-26 (Ga. SBE, Sep. 12, 1988). Hearsay evidence has no probative value and cannot be used to establish any fact in an administrative hearing. See McGahee v. Yamaha Motor Mfg. Corp., 214 Ga. App. 473, 474 (1994).

In the case sub judice, the Local Board relied upon evidence from Rawles that the female student told him during his investigation that she had sexual intercourse with the Student in the boys' restroom. The Local Board failed to offer any other evidence to support its allegation that the Student had engaged in sexual misconduct. Thus, the only evidence of sexual misconduct is hearsay.

The Local Board contends that the female student was unavailable, and therefore the necessity exception to the hearsay rule applies. O.C.G.A. § 24-3-1(b). "In order for a party to introduce testimony under the necessity exception, the Georgia courts have always required that the declarant be dead or unavailable, . . . there be particularized guarantees of trustworthiness", "the statement be relevant to a material fact and that it be more probative on that material fact than other evidence that may be procured and offered." Holmes v. State, 271 Ga. 138, 138-39 (1999).

In this case, the female student was subpoenaed but did not appear because she was allegedly sick. Thus, the female student was only unavailable on the day of the hearing, and not unavailable as defined by the Georgia courts. Furthermore, the Local Board did not seek a continuance in order to properly present her crucial testimony into evidence. Moreover, the hearsay testimony lacks in reliability and trustworthiness as the female student provided inconsistent versions of the events. Thus, Deputy Rawles' testimony does not have any probative value.

Any reliance by the Local Board on his testimony based upon the statements of the female student is a denial of due process. O.C.G.A. § 20-2-754(b)(3) provides that a student will have the right to examine and cross-examine all witnesses. The Student was denied the opportunity to cross-examine the female student who made the statements regarding their sexual conduct. See L.S. v. Carrolton City Bd. of Educ., Case No. 2007-58 (Ga. SBE, Oct. 11, 2007). Thus, the Local Board erred in concluding that the Student engaged in sexual misconduct.

C. Evidence supports the remaining allegations.

The Student asserts that the evidence also does not support the allegation that he entered an unauthorized area, made false statements to school staff, and skipped two classes. These assertions are without merit. The record contains sufficient evidence that the Student was not ill, lied to obtain a hall pass, wandered the halls, and talked in the boys' restroom for 30 minutes with a female student. Moreover, during the investigation, the Student lied about his reasons for entering the boys' restroom with a female student. Thus, the Local Board's decision on these grounds is supported by legally sufficient evidence.

III. CONCLUSION

Based upon the reasons set forth above, it is the opinion of the State Board of Education that the evidence does not support the decision of the Local Board in regards to sexual misconduct but the evidence does support the remaining allegations. The Local Board agrees that the punishment meted out to the Student was based upon the sexual misconduct under its disciplinary policy. Therefore, the Local Board's decision is SUSTAINED in regards to all allegations except the sexual misconduct which is REVERSED. This matter is therefore REMANDED to the Local Board for appropriate action.

This _____ day of April 2008.

WILLIAM BRADLEY BRYANT
VICE CHAIRMAN FOR APPEALS