STATE BOARD OF EDUCATION

STATE OF GEORGIA

A. M.,	:	
	:	
Appellant,	:	**CASE NO. 2009-64**
	:	
vs.	:	
	:	
FORSYTH COUNTY	:	
BOARD OF EDUCATION,	:	**DECISION**
	:	
Appellee.	:	

This is an appeal by A. M. (Student) from a decision by the Forsyth County Board of Education (Local Board) to expel him until the end of the first semester of the 2009-2010 school year, with the option of attending alternative school during the period of expulsion, after a student disciplinary tribunal found him guilty of indecent exposure in a classroom and expelled him for one year. The Student claims that he was denied due process because the evidence does not support the Local Board's decision, hearsay evidence was improperly introduced at the tribunal hearing that biased the tribunal members, the hearing officer was biased, and the hearing officer's instructions to the tribunal were inadequate. The decision of the Local Board is reversed.

On March 23, 2009, while a video was being shown to a chemistry class, the Student laid down on the floor next to his desk. The next day, three students alleged that the Student exposed himself while he was on the floor. The school system charged him with indecent exposure and disrespectful conduct toward other students.

At the beginning of the hearing before a student disciplinary tribunal, the school system introduced three written statements that ostensibly were made by the students who made the allegations, but all identifying information was deleted from the statements. The statements all alleged that the Student pulled his pants down and exposed his genitals while lying on the floor. The Student objected to the introduction of the statements as hearsay because of his inability to cross-examine the students. The hearing officer, who also serves as the attorney for the Local Board, allowed the statements to be introduced and instructed the tribunal that they could give the statements whatever weight they chose to give them.

One of the students who gave a written statement, V. R., testified that the Student called his name, he glanced over, saw the Student on the floor, and then glanced down and saw the Student's penis. He then looked away immediately. V. R. and the two girls went to the administration and made a report the next day and gave their written

statements after they had discussed the incident. There was no other evidence that the Student committed the alleged act.

Six students and the teacher testified that they did not see the Student expose himself. One of the students, who watched the Student during the entire time he was on the floor, testified that the Student did not expose himself. A female student testified she saw the Student on the floor but did not see him exposing himself, although her observations were intermittent. The other four students testified they did not see or hear any commotion. Four of the students testified that when the Student's subpoenas were delivered to them, they were told that they did not have to appear at the hearing, that the subpoenas did not have to be obeyed. The Student also introduced the results of two lie detector tests from two different examiners that concluded that the Student was truthful when he denied that he had exposed himself.

The tribunal found the Student guilty of the charges and expelled the Student until the end of the 2009-2010 school year. The Student appealed to the Local Board and the Local Board reduced the punishment to expulsion through the end of the first semester of the 2009-2010 school year with the option of attending an alternative school during the expulsion period. The Student then appealed to the State Board of Education.

O.C.G.A. § 20-2-754(b)(3) provides that a student shall be "afforded an opportunity to ... examine and cross-examine witnesses on all issues unresolved." In the instant case, the Student was denied the statutory due process provided by O.C.G.A. § 20-2-754(b)(3) because he was not given an opportunity to cross-examine the students whose statements were introduced over objection. In addition, the Student was denied due process when the hearing officer erroneously instructed the tribunal that they could give the statements any weight they chose to give them. The statements were hearsay statements without any probative value whatsoever. *McGahee v. Yamaha Motor Mfg. Corp.,* 214 Ga. App. 473, 474, 448 S.E.2d 249, 251 (1994). The hearing officer's instruction, however, elevated the statements to the same status as if the students had given testimony at the hearing and had been subject to cross-examination. This instruction is contrary to Georgia law.[1] The statements cannot be offered for the truth of the matter asserted. Moreover, the statements were highly prejudicial and contained non-germane comments concerning sexual discussions between the girls and the Student at another time that reflected negatively on the Student's character. Considering that all of the other evidence pointed to the fact that the Student did not expose himself, the tribunal may have arrived at a different conclusion in the absence of these statements and the erroneous instruction from the hearing officer. When prejudicial, non-probative hearsay evidence is admitted, reversal is required. *See, Lyerly v. Phillips*, 188 Ga. App. 566, 568, 373 S.E.2d 663, 665 (1988).

The Student was also denied due process because the administration told the witnesses who were subpoenaed by the Student that they did not have to obey the

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[1] Hearsay testimony is wholly without probative value and cannot be given any weight even if introduced without objection. *See, Finch v. Caldwell,* 155 Ga. App. 813, 273 S. E.2d 216 (1980).

subpoenas. O.C.G.A. § 20-2-1160(a) grants local boards of education the authority to "summon witnesses", i.e., issue subpoenas that require attendance at a hearing. The Student was notified of his right to subpoena witnesses. It was not until he arrived at the hearing that the Student learned that the school system had made a concerted effort to thwart the value of his right to summon witnesses. The Student, however, failed to show that a witness did not appear because the school system told the witness it was unnecessary to appear. The Student also did not request a continuance upon learning of the school system's actions, nor did the Student make any proffer of the testimony denied to him. We, therefore, cannot determine whether the school system's denial of the Student's due process right to summon witnesses was harmful. Nevertheless, we believe the denial of the Student's right to cross examine witnesses because of the introduction of the prejudicial written statements, combined with the hearing officer's erroneous instructions that the tribunal could give any weight it wanted to non-probative hearsay, requires reversal of the Local Board's decision.

We are mindful that the standard for review by the State Board of Education of local board decisions is that if there is any evidence to support the decision of the local board of education, then the local board's decision will stand unless there has been an abuse of discretion or the decision is so arbitrary and capricious as to be illegal. *Roderick J. v. Hart Cnty. Bd. of Educ.*, Case No. 1991-14 (Ga. SBE, Aug. 8, 1991). In the instant case, however, although there was the testimony of one student that the Student exposed himself, the denial of the Student's due process rights to cross-examine witnesses and to summon witnesses, the introduction of the prejudicial hearsay statements, and the hearing officer's erroneous instructions regarding the weight to be given to the statements makes the Local Board's decision unsustainable.

Based upon the foregoing and a review of the record, it is the opinion of the State Board of Education that the school system denied the Student due process by denying him the right to cross-examine witnesses, interfering in his right to summon witnesses, and by admitting prejudicial hearsay evidence and giving improper instructions regarding such evidence. Accordingly, the Local Board's decision is
REVERSED.

This _______ day of September 2009.

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William Bradley Bryant
Vice Chairman for Appeals