STATE BOARD OF EDUCATION
STATE OF GEORGIA

D.B.,	:	
	:	
Appellant,	:	
	:	**CASE NO.: 2022-10**
v.	:	
	:	**DECISION**
BIBB COUNTY	:	
BOARD OF EDUCATION,	:	
	:	
Appellee.	:	
	:	

This is an appeal by D.B. ("Student") from a decision by the Bibb County Board of Education ("Local Board") to suspend the Student through the end of the 2021-2022 school year for violating the student code of conduct by engaging in a Level IV Verbal Assault and Level V Terroristic Threats. For the following reasons, the Local Board's decision is **AFFIRMED, in part,** and **REMANDED, in part**.

I. STATEMENT OF FACTS

On September 30, 2021, the Student, was an eleven (11) year-old sixth grader at Howard Middle School ("School"), receiving special education services. The record indicates that the Student and a classmate were upset with each other for reasons that are unclear. Regardless, on the day of the incident, the students were at lunch when the classmate lunged at the Student. In response, the Student threatened to shoot the classmate and the classmate's mother, who is a teacher at the School. A faculty member took both students to Assistant Principal John Hankinson's ("Assistant Principal") office. There the Student acknowledged making the threatening comment to the classmate.

The Bibb County School District ("District") issued the Student a notice of disciplinary action on October 5, 2021. The notice accused the Student of violating Local Board code of conduct policies: Level IV- Verbal Assault, including threatened violence of other students, school personnel or individuals attending a school-related function; Level IV - Second Act of Bullying, harassment cyber-bullying or intimidation, as defined by the District's Bullying Policy in accordance with O.C.G.A. § 20-2-751.4; and Level V - Engages in conduct containing the elements of the offense of Terroristic Threats. The notice also scheduled a disciplinary hearing for October 21, 2021. On October 8, the District sent a second notice to the Student's guardian informing that a manifestation determination review ("MDR") would be conducted on October 19, prior to the scheduled disciplinary hearing. The MDR would determine whether the Student's misconduct was a manifestation of his disability. The MDR committee met and determined that the misconduct was not a manifestation of the Student's disability, which allowed the disciplinary hearing to proceed.

On November 4, 2021, Hearing Officer Randy Howard ("Hearing Officer") conducted the disciplinary hearing. During the guilt or innocence phase of the hearing, the School presented undisputed evidence that the Student admitted to saying that he would shoot a classmate and the classmate's mother. The Hearing Officer heard all other testimony and evidence presented. After which, he notified the parties that it would take 24 to 48 hours to review the record and render a decision. Thereafter, in a written decision, the Hearing Officer found the Student guilty of the violating Level IV - Verbal Assault and Level V – Terroristic Threats of the Local Board code of conduct. The Hearing Officer suspended the Student through the end of the 2021-2022 school year, with the opportunity to attend SOAR Academy, the District's alternative school.

The Student appealed the Hearing Officer's decision to the Local Board. The Local Board affirmed the decision of the Hearing Officer regarding guilt and punishment. Subsequently, the Student filed a timely appeal to the State Board of Education ("State Board").

II. STANDARD OF REVIEW

A review of a student disciplinary decision by the State Board "shall be confined to the record" and shall not be a *de novo* review. See O.C.G.A. § 20-2-1160(e).

The Georgia Supreme Court has provided the following standard of review for student disciplinary appeals:

> On appeal of a student disciplinary decision, the [State Board] reviews whether the record supports the initial decision of the local school board. The [State Board] applies the any evidence standard of review to the local board's decision as to any factual issue. It is the role of the [fact finder] to weigh the evidence and determine the credibility of witnesses, and not the [State Board]. Under the any evidence standard of review, so long as evidence exists that supports the local board's decision, it should not be reversed on appeal unless the record shows the local board grossly abused its discretion or acted arbitrarily or contrary to law… An abuse of discretion would be present if the local board misapplied the relevant law or if its rulings are not supported by the evidence.
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> *Henry Cnty. Bd. of Educ. v. S.G.*, 301 Ga. 794 at 798 (2017) (adapted for the State Board and omitted citations of authority).

III. ISSUES ON APPEAL

A. Did the School Offer Sufficient Evidence to Support a Determination that the Student Engaged in Terroristic Threats?

The Local Board's student code of conduct states that a student commits a Level V Terroristic Threat violation when that student "[e]ngages in conduct containing the elements of the offense of terroristic threats*." Bibb County School District Student Code of Conduct*, p. 13. The Local Board's code of conduct does not lay out the elements of the offense of Terroristic Threats. However, the record shows that the Local Board's policy relies upon the Georgia Code to define

a "terroristic threat." A student commits a terroristic threat when he or she threatens to commit any crime of violence with the purpose of terrorizing another or recklessly disregarding the risk of causing terror to another. See O.C.G.A § 16-11-37.

The Student contends that there was insufficient evidence proving that he engaged in terroristic threats. The Student argues that he lacked the requisite intent to terrorize another and, therefore, is entitled to an infancy defense.

1. Did the Student lack the necessary intent to commit a terroristic threat?

The first element of the offense of Terroristic Threats is threatening to commit a violent crime. The record shows that the Student confessed to saying that he would shoot the classmate and the classmate's mother. Shooting another person is a violent crime, and the Student admitted to articulating that threat. The Student's conduct satisfies the first element of the Local Board policy regarding Terroristic Threats.

Although the Student does not dispute that he made the threat, he insists that he did not violate the Local Board's policy because the Local Board offered no direct evidence of his intent to terrorize, or of his reckless disregard for causing the terror of, another. The Local Board counters that it put forth evidence that the Student and the classmate were upset with one another, that the classmate lunged at the Student, and that thereafter, the Student threatened the classmate. In addition, the classmate cried when recounting the threat, which the Local Board claims was a sign that the classmate was fearful of the threat. The Local Board argues that its evidence proves that the Student not only intended to terrorize the classmate but was successful at terrorizing the classmate.

The Georgia Court of Appeals has made clear that direct evidence that an individual made threats for the purpose of terrorizing another is not necessary "if the circumstances surrounding the threats are sufficient for a jury to find the threats were made for such a purpose." *Moss v. State*, 139 Ga. App. 136 (1976) Additionally, the second element of a terroristic threat requires only that the trier of fact find specific intent to terrorize *or* reckless disregard for causing the terror of another. The hearing officer, like a jury, "sits as the trier of fact", and the State Board will reverse the determination only if there is a complete lack of evidence. *F. W. v. DeKalb Cnty. Bd. of Educ.*, Case No. 1998-25 (Ga. SBE, Aug. 1998). In this instance, the State Board finds that the Local Board's evidence, establishing that the Student articulated a threat to shoot and kill his classmate and the classmate's mother, was enough to prove the Student intended to terrorize his classmate in violation of the Local Board's code of conduct.

2. Is the Student's infancy an affirmative defense against the charge of misconduct?

The Student argues that O.C.G.A. § 16-3-1 recognizes that a child under the age of thirteen (13) cannot form the requisite intent necessary to commit criminal acts. The Student further argues that if the Local Board's code of conduct defines the offense of Terroristic Threats in accordance with the State's criminal definition, then the affirmative defense of infancy should be available to rebut the code of conduct charge, in the same way that the infancy defense is available in other non-criminal contexts, such as tort actions.

It is well established that local boards of education "provide for disciplinary action against students who violate student codes of conduct". O.C.G.A. § 20-2-736(b). Furthermore, this Board has previously held that student disciplinary matters are not governed by state criminal law. *See Alvin J. v. Rome City Bd. of Educ.*, Case No. 1986-24 (Ga. SBE, Sept. 1986). In this matter, the Student is not charged with a criminal violation. The Student is charged with violating the Local Board's student code of conduct. The student code of conduct governs the behavior of students in kindergarten through 12th grade. Should infancy be recognized as a defense for code of conduct violations, it would greatly impact a local board's ability to dispense discipline to students under the age of thirteen (13) who engage in dangerous and disruptive misconduct.

Additionally with regard to Terroristic Threats, this Board has previously held that a "Local Board's policy … is not a criminal statute and does not require all of the protections of a criminal statute; a lesser standard of conduct is permitted by local boards of education in establishing the conduct standards within a school." *J.C. v. Henry Cnty. Bd. of Educ.*, Case No. 2014-35 (Ga. SBE, Apr. 2014). For the reasons above, the Board finds that infancy is not a defense against a student code of conduct violation.

B. Did the Local Board Violate the Student's Due Process Rights by Failing to Consider All Testimony and Evidence Regarding the Appropriate Punishment for the Student's Misconduct?

In the notice of hearing provided to the Student, the School indicated that it was seeking the Student's expulsion from the District for the remainder of the 2021-2022 school year. The Hearing Officer's decision, issued after the disciplinary hearing, suspended the Student from the School through the end of the 2021-2022 school year with the option to attend the SOAR Academy during the period of suspension. The Student claims that his due process rights were violated during the hearing when the Hearing Officer stated that he would not consider the issue of punishment, then rendered a written decision on punishment after the hearing. Additionally, the Student asserts that the Hearing Officer made an arbitrary determination of punishment without receiving evidence regarding an appropriate punishment.

Below is the relevant discussion from the Student's disciplinary hearing between the Hearing Officer and the Student's attorney, Kamala Buchanan, regarding the Hearing Officer's role in determining the Student's punishment.

> Howard: Is there any evidence that the representation for — and I am saying representation for, Ms. Buchanan, because there are so many of you. So, I am asking is there any evidence that anyone would like to present on [the Student's] behalf. You are not required to do so, but you can.
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> Buchanan: I don't believe so, but I just want to clarify that at this time, are we only concerned with the question of guilt or innocence and not the appropriateness of the punishment?

Howard: That is right. Well, the IEP [Individualized Education Program] team will — I will render my opinion on the guilt or innocence related to each charge, individually.

Buchanan: I see.

Howard: And then I will put in my order that the disposition as to placement will be sent back to the IEP team, which I think Mr. Howell would be a part of, to render the final decision since the student is a — is receiving special education services. As required, the IEP team makes the final decision on placement.

Buchanan: I see. Okay, no, then at this point, I don't have any witnesses to call.

Howard: Okay, I will tell you what I am going to do. I have twenty-four, or forty-eight hours to get you all a decision on the guilt or innocence of [the Student] as it relates to the charges. So, what I am going to do — I am going to be perfectly honest with all of the parties, as there are several charges against [the Student]. So, what I need to do is look at the evidence, consider it, along with the testimony, Ms. Buchanan and others, so that I can get back to you all on each charge that I find the Student guilty of, or each charge which I feel the District has not met its burden of proof. Okay? So, I will not make a decision right now today. I feel like I would be doing an injustice to the District, as well as to [the Student], to render a decision right now. I need to look through this stuff. This is my first time hearing it and first time seeing it. So, I want to make sure that I render an appropriate and fair decision to [the Student].

Student Disciplinary Hearing Transcript, p. 14:

The Hearing Officer's written decision found the Student guilty of two (2) of the three (3) charges and punished the Student by removing him from the School and assigning him to SOAR Academy for the remainder of the 2021-2022 school year, with the instruction that the IEP team would review the punishment for final consideration and placement.

At the Student's appeal hearing before the Local Board on November 29, 2021, the Local Board chair asked the School whether the Hearing Officer, having stated his intent to not consider disposition or appropriateness of punishment, should have issued a decision determining the duration and placement of punishment. The School responded, in relevant part,

> that the child has been made (inaudible) there is not a whole lot on record about what other students and school district employees at SOAR Academy (inaudible) that the child's needs are evaluated by the IEP Team and they come up with the best plan for the student as far as placement (inaudible). The statement of Mr. Howard at the hearing was a tad bit unfortunate, but what I believe Mr. Howard was trying to convey was that his part of this matter would not get into the IEP/

I[D]EA issues, that is separate and apart, and that he would not make a decision as to that. But he did make a decision as to a placement at SOAR, which was well within the realms of punishment for a level IV offense and a level V offense.

Bibb County Board of Education: Appeal Hearing - Monday November 29, 2021, p. 9.

The record does reveal that there was some confusion regarding punishment and placement. After offering testimony and evidence regarding the Student's guilt, the School rested its case. Then, before declining to offer testimony and evidence, the Student clarified that the Hearing Officer was solely considering guilt, not the appropriateness of punishment. The Hearing Officer agreed that he would forward his opinion of the Student's guilt or innocence on each of the three (3) charges to the IEP Team for "the disposition as to placement." Learning that the Hearing Officer would not determine punishment, the Student offered no testimony and evidence regarding punishment. Although there was an evidentiary phase to the hearing, where the parties could provide testimony and evidence or examine and cross-examine witnesses regarding the Student's guilt, there was no punishment phase to the hearing. The parties had no opportunity to provide testimony and evidence or to examine and cross-examine witnesses regarding an appropriate punishment for the Student

Once he understood that the Hearing Officer would not consider evidence regarding punishment, the Student rested his case. Thereafter, the School Attorney, Samuel Joyce ("School Attorney"), gave his closing argument. In the School's closing, over the Student's objection, the School Attorney requested that the Assistant Principal explain why the Student should be removed from the School. The School also introduced the Student's attendance record and prior disciplinary conduct, as support for a recommendation of suspension from the District for the remainder of the 2021-2022 school year.

In the discussion below, over the objection of the Student's attorney, the Hearing Officer explains that he will give the School "leeway" to provide evidence in its closing but will not consider that evidence when making his determination of guilt or innocence.

Buchanan: I would like to object to this line of Counsel's argument. Evidence of Student's past conduct is not relevant to his guilt or innocence with respect to this charge. It cannot be used to show that he did or did not commit the specific incident that he is charged with.

Howard: I agree, Ms. Buchanan, I will give Counsel a little leeway because the Court will not consider anything related to attendance and prior behavior in the adjudication of guilt or innocence. So it is so noted, Counsel.

Buchanan: Thank you.

Howard: I will give [the Student] -- just like I will give you some leeway in your closing. Go ahead.

Joyce: And Your Honor, my point there was not for guilt or innocence, but in the portion of the disposition phase, which I understand is going to go to the IEP team, but I think that all factors should be considered in this hearing, as an evidentiary portion and disposition portion, and that should be taken into account, as well for that portion, not for the guilt or innocence of the Student.

Howard: Duly noted, Counsel

Student Disciplinary Hearing Transcript, p.15, 16:

During its closing argument, in the above interaction, the School acknowledged its understanding that the Hearing Officer intended to refer the issue of appropriate punishment to the Student's IEP Team for disposition. However, the School insisted that both the questions of guilt and punishment should be considered in the disciplinary hearing. The School maintained that all available evidence should be considered when determining the disposition of a student's case. The record shows that the Hearing Officer having previously stated that the determination of appropriate punishment would be referred to the Student's IEP Team, did not reverse that determination during the hearing. Instead, as indicated above, the Hearing Officer noted, but did not affirm, the School's position that both guilt and punishment should be considered during the disciplinary hearing. As part of the leeway provided it during closing argument, and over the Student's objection, the School was allowed to offer testimony from the Assistant Principal and introduce evidence of the Student's attendance history and prior conduct in support of its punishment recommendation. Because the Assistant Principal's testimony was offered during the School's closing, the Student was not afforded the opportunity to cross-examine the School's witness.

O.C.G.A. § 20-2-754(b)(3) provides that "[a]ll parties are afforded an opportunity to present and respond to evidence and to examine and cross-examine witnesses on all issues unresolved." Furthermore, a hearing officer "shall conduct the hearing and, after receiving all evidence, render its decision, which decision shall be based solely on the evidence received at the hearing." O.C.G.A. § 20-2-754(c). In this case, the Hearing Officer's assertion that the IEP Team was making the decision about punishment dissuaded the Student from offering testimony and evidence regarding the unresolved issue of punishment. The Hearing Officer stated that he would not render a determination on the unresolved issue of punishment. Then, subsequent to the hearing, he issued a decision regarding punishment without having received all of the available evidence related to that issue.

The Local Board speculates that had the Student presented evidence, his evidence would have been inappropriately concerned with which placement best supported his special education needs, a question outside the scope of a disciplinary hearing. Therefore, contends the Local Board, the Hearing Officer's failure to consider the Student's evidence is harmless error. However, in this instance, there is no way of knowing whether the Student may have raised improper concerns during the hearing, because there was no opportunity for him to question the issue of punishment in accordance with O.C.G.A. § 20-2-754(b)(3). In student disciplinary hearings, punishment is an

unresolved issue, and the Student has the right under Georgia law to offer testimony and evidence in support of limiting his suspension and returning to his local school. There is no indication in the hearing transcript that the Student intended to explore issues regarding IEP implementation during the disciplinary hearing. When the issue of the Student's IEP was raised during the hearing, it was the Hearing Officer, not the Student, who raised it. The record shows that the Hearing Officer plainly stated that the IEP Team, not he, would make the decision regarding punishment. Thus, the Student was not afforded the opportunity to present and respond to evidence, and to examine and cross-examine witnesses on an unresolved issue.

"It has been held consistently that the courts will not interfere with a local board's administration of its schools unless the board's actions are contrary to law, or it appears that the board has grossly abused its discretion." *D.B. v. Clarke Cnty. Bd. of Educ*., 220 Ga. App. 330, 333 (Ga. App. 1996). After careful consideration of the record, the State Board finds that the Local Board acted contrary to O.C.G.A. § 20-2-754(b) and (c) by not allowing the Student the opportunity to present and respond to evidence or to examine and cross-examine witnesses on the unresolved issue of punishment prior to issuing its decision.

C. Did the Local Board Provide the Student a Fair and Impartial Hearing?

The Student argues that the Hearing Officer was an employee of the District and therefore, biased against the Student's interests. The State Board has held that there is no prohibition against a Local Board attorney also serving as a hearing officer. *Sharpley v. Hall Cnty. Bd. of Educ*., Case No. 1981-20 (the decision of Hall County Superior Court, affirming the decision of State Board of Education in *Sharpley v. Hall Cnty. Bd. of Educ.*, 251 Ga. 54, 303 S.E.2d 9 (1983)). To determine that a hearing officer was biased, there must be some record evidence of the bias. A thorough review of the record reveals no bias on the part of the Hearing Officer. The State Board finds no merit to this assertion.

IV. CONCLUSION

Based on the foregoing, the State Board finds sufficient evidence to support the decision of the Local Board, in part. Regarding **Sections III(A)** and **(C),** the Local Board decision is **AFFIRMED**. However, **Section III(B)** is **REMANDED** to the Local Board for a hearing regarding the appropriate punishment for the Student's code of conduct violations.

This 16th day of June, 2022.

LEONTE BENTON
VICE CHAIR FOR APPEALS