

**STATE BOARD OF EDUCATION
STATE OF GEORGIA**

D.A.,	:	
	:	
Appellant,	:	
	:	CASE NO.: 2020-21
v.	:	
	:	DECISION
GWINNETT COUNTY	:	
BOARD OF EDUCATION,	:	
	:	
Appellee.	:	
	:	

This is an appeal by D.A. (“Student”) from a decision by the Gwinnett County Board of Education (“Local Board”) to suspend the Student from November 15, 2019 through June 1, 2020, for violating the Local Board’s student code of conduct Rule 4AA Oral Threat/Verbal Assault (oral speech that creates, or is intended to create, a fear of physical harm). The record evidence supports the Student’s claim that the decision is unsupported by the evidence. As such, the Local Board’s decision is **REVERSED**.

I. STATEMENT OF FACTS

The Student enrolled in the International Transition Center (“ITC”) on October 22, 2019. The ITC is a Gwinnett County Public School (“District”) program designed to educate students with limited English language proficiency. Prior to his enrollment at the ITC, the Student was detained by the Office of Refugee Resettlement for 14 months after leaving Central America.

Based on the investigation conducted by ITC Assistant Principal O.J. Soto (“AP”), on or about October 28, 2019, the Student confided his concerns about Language Development teacher, Maria Gayton’s, treatment of him to his English Speakers of Other Languages (“ESOL”) teacher, Ruth Delanoy. During the conversation, the Student told Ms. Delanoy that, “Ms. Gayton doesn’t know who she is messing with.” Ms. Delanoy advised the Student to remain respectful toward Ms. Gayton and the Student indicated that he understood. Thereafter, the Student requested an opportunity to meet with the ITC social worker to discuss some concerns.

On or about November 5, 2019, Ms. Gayton approached Ms. Delanoy to discuss managing the Student’s behavior during class. During the conversation, Ms. Delanoy shared the Student’s statement with Ms. Gayton. The next day, November 6, 2019, at approximately 11:17 am, Ms. Gayton sent an email to the AP conveying her concern for her safety as a result of the Student’s statement.

The AP spoke with the Student, who acknowledged making the statement. The ITC suspended the Student for violating Student Code of Conduct policy Rule 4 Section A which states:

Regardless of intent, a student shall not:

Make oral or written communication, create a document, or make a symbolic gesture or contact of a threatening, undermining, or provoking nature to or about a school employee or in the presence of a school employee. This includes, but is not limited to, disrespectful conduct. Insult, use of profanity, ethnic, racial, sexual, disability, or religious slur, or harassment and includes the development of a “hit list”, “people to kill”, “people to shoot”, or a statement about bringing a weapon to school and injuring people.

The prohibited behaviors include, but are not limited to the following:

4AA. Oral threat/verbal assault (oral speech that creates, or is intended to create, a fear of physical harm);

A disciplinary hearing was conducted on November 15, 2019. The disciplinary tribunal (“Tribunal”) found the Student guilty of violating Rule 4AA Oral Threat/Verbal Assault and suspended the Student through June 1, 2020 with the option to attend the alternative school. Additionally, the Student was given the opportunity to complete 20 hours of community service by December 20, 2019, in order to return to the ITC beginning January 1, 2020, under a Behavior Placement Plan for the remainder of the 2019-2020 school year.

The Student appealed the Tribunal’s decision to the Local Board which affirmed the decision. The Student then filed an appeal to the State Board of Education (“State Board”) on December 13, 2019. The District forwarded the appeal to the State Board of Education on December 26, 2019. However, the State Board did not receive the transcript from the disciplinary hearing until January 9, 2020.

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.

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 Local Board Violate the Student’s Due Process Rights by Failing to Timely Forward the Tribunal Transcript to the State Board?

O.C.G.A. § 20-2-1160(b) provides that “the local superintendent shall within 10 days after the filing of the appeal, transmit to the state school superintendent a copy of the appeal, together with the transcript of evidence and proceedings, the decision of the local board and other matters in the file relating to the appeal.”

Although the Local Board timely forwarded a copy of the Student’s appeal to the State Board on December 26, 2019, the transcript of the tribunal proceedings was not received until January 9, 2020. The Student argues that the Local Board violated his due process rights by failing to timely submit the transcript together with the appeal, as required by O.C.G.A § 20-2-1160(b). The Local Board counters that O.C.G.A. § 20-2-1160(a) is directory and not mandatory as set forth in *Glass v. City of Atlanta*, 293 Ga. App. 11 (2008). In *Glass*, the Georgia Court of Appeals said:

In *Hardison v. Fayssoux*, this Court recognized that “in its ordinary signification ‘shall’ is a word of command, and the context ought to be very strongly persuasive before that word is softened into a mere permission.” (Punctuation omitted.) However, we also noted that “in the absence of injury to the defendant, a statute which directs that some act be done within a given time period, but prescribes no penalty for not doing it within that time, is not mandatory but directory; that is, that in such instances ‘shall’ denotes simple futurity rather than a command.”

Glass, 293 Ga. App. at 15, quoting *Hardison v. Fayssoux*, 168 Ga. App. 398, 400(1983).

O.C.G.A. § 20-2-1160(a) does not articulate a penalty for a local board’s failure to timely transmit the hearing transcript and is therefore directory. Nevertheless, the statute is mandatory if the Local Board’s failure to comply causes injury to Appellant. In *Glass*, the Georgia Court of Appeals cited the Supreme Court’s decision in *Fed. Deposit Ins. Co. v. Mallen*, 486 U. S. 230, 242 (1988), in which “the Supreme Court cautioned lower courts not to be improperly concerned with the danger of an interminable delay, but instead to look at the delay in the specific case and what might have happened differently had there been no delay. Specifically, courts should consider the harm to the plaintiff’s interest, the justification for the delay offered by the state, and the likelihood that the interim decision may have been mistaken.”

In this instance, the record shows that the hearing transcript was certified by the transcriptionist on January 6, 2020 and received by the State Board on January 9. The Local Board timely forwarded the appeal but was unable to forward the hearing transcript because it had not yet received the transcript. Additionally, the Appellant has failed to articulate an injury caused by the delay. The State Board finds the Local Board made the transcript available as soon as it was received. The Student suffered no injury as a result of the delay. Therefore, the Local Board’s

failure to timely deliver the transcript to the State Board was harmless error.

B. Did the Local Board Fail to Adequately Notify the Student of the Prohibited Conduct?

The Student argues that his first language is Spanish, but he was not provided a Spanish language copy of the student code of conduct handbook. The record offers no definitive insight into whether a Spanish copy was provided. The AP testified that generally the handbook is offered to students in both English and Spanish, but no Spanish language handbook receipt was made a part of the record. Regardless, the Student failed to offer testimony or evidence that he did not receive the handbook in Spanish, and/or that the English language handbook was insufficient to notify him of the appropriate student conduct. The State Board finds the Student's assertion that he was not given notice of prohibited conduct is without merit.

C. Is There Sufficient Evidence to Prove That the Student Violated Local Board Rule 4AA Prohibiting Verbal Threats That Create or Intend to Create a Fear of Physical Harm?

The Local Board code of conduct Rule 4AA prohibits, oral threats/verbal assault (oral speech that creates, or is intended to create, a fear of physical harm. The Local Board claims that the Student's statement, "Ms. Gayton doesn't know who she is messing with," is a veiled threat of physical violence. The Local Board alleges that when Ms. Gayton heard it, the statement created in her a fear that her life was in danger. Ms. Gayton testified that prior to the incident, she interacted with the Student on approximately five (5) occasions. On those occasions, the Student made her "uncomfortable". However, in her testimony Ms. Gayton did not identify any specific behaviors that caused the discomfort. During one of their interactions, the Student asked Ms. Gayton to assist him with making an appointment to see the ITC counselor. That counseling session occurred on November 4, the day before Ms. Delanoy mentioned the Student's statement to Ms. Gayton, but after the Student had caused her discomfort. Ms. Gayton testified that she made no effort to discuss her concerns about the Student with the counselor.

The record shows that the Student made the statement after complaining to Ms. Delanoy, that Ms. Gayton yelled at him and was disrespectful toward him. Ms. Delanoy testified that she wondered why the Student would make the statement, but she did not report it to an administrator, nor did she attempt to contact Ms. Gayton at that time. It was not until a professional development event days later, that Ms. Delanoy shared the Student's statement with Ms. Gayton. Once aware of the statement, Ms. Gayton waited until mid-morning the following day to report the statement to the AP. The record does not specify what about the Student's behavior caused Ms. Gayton to assume that the Student was threatening to physically harm her and not just report her to an administrator for alleged mistreatment. The record shows that Ms. Delanoy heard the Student articulate the statement and did not assume that the Student was threatening physical harm. The record does not reflect whether anyone even asked the Student what he meant by the statement. Based on the testimony and evidence proffered by the Local Board, the statement standing alone is insufficient to determine whether the Student intended to file a complaint or commit violence. Therefore, upon careful consideration of the record, the State Board finds the Local Board has failed to present any evidence that the Student created or intended to create a fear of physical harm.

IV. CONCLUSION

Based on the foregoing, the State Board finds that there was no evidence to support the Local Board's decision. Therefore, the decision of the Local Board is **REVERSED**.

This the 14th day of May, 2020.

LISA KINNEMORE
VICE CHAIR FOR APPEALS