01-0118685

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	:	**Docket No.:**
	:	**OSAH-DOE-SE**
Petitioner,	:	**01-18685-25-WJB/MPW**
vs.	:	
	:	
SAVANNAH-CHATHAM COUNTY	:	
SCHOOL DISTRICT,	:	
Respondent.	:	

FINAL DECISION

This matter was heard by M. Patrick Woodard, Jr., Administrative Law Judge ("ALJ") on May 18, 2001, in Savannah, Chatham County, Georgia. A request for a Due Process Hearing was filed by [redacted], the Petitioner [redacted]'s mother, regarding incidents of alleged inappropriate physical restraint by at least one employee of the Savannah-Chatham County School District ("School District"). The Petitioner alleges that these incidents violate the provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* The Respondent School District asserted that no incident of inappropriate physical restraint actually occurred, or, if an incident did occur, that it did not give rise to any remedy under IDEA.

The Petitioner was represented by Sage Brown, Robert German, and Angel Blair (*pro hace vice*), Sage Brown and Associates, Savannah. The Respondent was represented by D. Brian Dennison, Bouhan, Williams & Levy, Savannah, and Phillip R. Hartley, Harben & Hartley, Gainesville, Georgia.

The School District filed a Motion to Dismiss Request For Due Process Hearing on day of the hearing. The motion was renewed orally at the conclusion of the Petitioner's case-in-chief, but the ruling was reserved so the Petitioner could file a written response. The Petitioner filed his response on May 29, and the Respondent filed its reply on June 5. The proceedings were closed on June 16, after the ten day period for further response by the Petitioner under OSAH Rule 616-1-2-.15 expired. [1]

II. Findings of Fact

1. The Petitioner, [redacted], d.o.b. [redacted], lives in Savannah and is a student in the Savannah-Chatham County School District. At the time of the hearing, [redacted] was in the sixth grade at [redacted] Middle School (Tr. 67).

2. According to [redacted]'s mother, he began exhibiting behavioral problems as early as Kindergarten (Tr. 70). [redacted] has since been diagnosed with schizoid personality disorder, inappropriate affect, and severe attention deficit hyperactivity disorder of mixed type. He possibly suffers from manic depression as well (Joint Exhibit 74).

3. [redacted] has been evaluated by the Department of Special Education of the School District. An "Individualized Education Program," or "IEP," has been adopted, following extensive interdisciplinary efforts, for each school year he was in the Special Education program. The IEP for the 1999-2000 school year was prepared in May, 1999, and was in effect for [redacted] 5th grade year at [redacted] Elementary School (Joint Exhibit 83-97).

4. [redacted] demonstrated behavioral problems in the classroom in previous years, and therefore a Behavioral Intervention Plan was included in his IEP for the 1999-2000 school year (Joint Exhibit 89). The plan was designed to address "target behaviors" of "handling anger appropriately, accepting responsibility for actions," and "appropriate social interactions." Intervention strategies included use of tokens, "positive praise," and a "boomerang book." Consequences for [redacted]'s problem behavior were listed as follows:

(1) Phone Call to family;
(2) In-School Suspension;
(3) time-out in Classroom; and
(4) time-out at Home.

Physical discipline or physical restraint was not listed in the Behavior Intervention Plan as an appropriate consequence for [redacted]'s behavior, although the School District had guidelines in place governing and limiting physical discipline, including the use of physical restraint.

5. During the 1999-2000 school year, there was no complaint brought by [redacted] or his mother to the School District that any teacher or other employee of the School District had used physical discipline on [redacted], or that he had been physically restrained in any manner.

6. [redacted] attended [redacted] Middle School during the 2000-2001 school year (Since this hearing was conducted close to the summer break, it is assumed that [redacted] completed the school year at [redacted]). There were no complaints of physical discipline or restraint against any teacher or other employee at [redacted]. However, in a letter dated April 2, 2001, the School District was notified by [redacted]'s mother, [redacted], of the following:

> It has recently come to my attention that the disciplinary procedures instituted against [redacted] while [redacted] was in attendance at [redacted] Elementary School were not disciplinary procedures that I knowingly authorized.

[redacted]'s mother requested that the School District provide "a free and appropriate public education, free from corporal punishment," or provide the name of a school outside the district where corporal punishment was not used. Further, the letter contained a demand for compensation for:

> damages resulting from the use of excessive corporal punishment and the costs of compensatory education resulting from your failure to provide [redacted] with a free appropriate public education while [redacted] was enrolled in the Savannah Chatham County School District. As a result of the conduct of the Board, [redacted] has been forced to endure unnecessary pain and suffering and deprivation of his constitutional right to be free from excessive corporal punishment and his right to a free and appropriate public education.

(Petitioner's Exhibit P-2; Tr. 79)

7. The request for a due process hearing was forwarded to State Department of Education, which then referred the matter to the Office of State Administrative Hearings. Prior to the hearing, the parties went through mediation and resolved most issues in dispute. Among the issues that were resolved were the inclusion in future IEPs of possible use of physical restraint by the School District, and the proper training of staff in the proper use of restraint. "However, the parties could not reach an agreement concerning the previous use of physical restraint by the Savannah-Chatham County School District." (Petitioner's Response to the Respondent's Motion to Dismiss Request for Due Process Hearing, p.3).

8. At the hearing, Ms. [redacted] testified that she had spoken with a friend, Ms. [redacted], about physical restraint used by the School District against the friend's child. This incident occurred during the 2000-2001 school year. When Ms. [redacted] asked [redacted] if he had ever been physically restrained, he responded that he had been restrained on two occasions during the 1999-2000 school year. Ms. [redacted] stated that she had observed a paraprofessional teacher, Ms. Grant, sitting on a child's back to physically restrain him during the 1999-2000 school year. The restraint lasted between 5 and 10 minutes (Tr. 81-97). She never observed any physical restraint used on [redacted], however, nor was she aware of any such incident until she questioned [redacted] after learning of the physical restraint used against her friend's child (Tr.99-100).

9. Based on her testimony and observation of her demeanor, Ms. [redacted] testimony about what she observed and heard is credible.

10. [redacted] testified on direct examination that he was restrained by Ms. Grant in the

computer lab and then the mail room. He testified that he was first restrained in the computer lab after he lost a ring and tried to locate it. He described how Ms. Grant tripped him from behind, put her knee on his back, and held his arms down with her hands. Later, in the mailroom, [redacted] was not doing his work. He testified that Ms. Grant held his arm behind his back then put him to the ground. She again sat on his back and held his arms down (Tr. 116-118)

11. On cross-examination, [redacted] testified that she was seated in the computer lab when Ms. Grant took him out of his chair and restrained him on the floor. He stated that she sat on him for "15-20 minutes," and that he was crying and yelling. He stated that other children observed this incident. He testified that he was later taken to the mailroom, which is used as a "time out" room at [redacted] Elementary School. He was seated, but not doing his work, when Ms. Grant again lifted him out of his chair and restrained him on the floor. There were no witnesses to this alleged act of restraint. [redacted] stated that he was in pain from being restrained, but he told no one about either incident. He said that Ms. Grant did tell the regular classroom teacher, Ms. Dubose, that she had restrained him (Tr. 118-139).

12. [redacted] is [redacted] years old, and discrepancies and errors in his testimony are to be expected. However, the record contains documentation that [redacted] has often been untruthful in the past, and that he would say things to get out of school that were not true. He did not report this alleged incident to anyone, including his mother, until many months had passed and his mother learned of an incident of physical restraint against another child. To wait so long to report such an incident appears to be out of character. The ALJ finds that [redacted]'s testimony about the alleged acts of restraint is not credible.

13. Ms. Grant testified that she did not restrain [redacted] at any time. She would only use physical restraint if a child was hurting themselves or others (Tr.212), and [redacted] was not prone to such behavior (Tr.213). She testified that she had used physical restraint on other children. She was trained in, and used, a technique called the basket-hold. This technique was designed to prevent the child from hurting anyone, while causing no pain or injury to the child. The basket-hold was described in great detail at the hearing by both Ms. Dubose and Ms. Grant. (Tr. 162-165; 218-230)

14. Ms. Dubose testified that she had been [redacted]'s teacher in a fifth-grade class for emotionally disturbed behavior disorders (EBD). She testified that at the beginning of the school year, [redacted] would feign illness to get sent home (Tr. 155). When this didn't work, he would threaten to kill teachers. (Tr. 155-156). When this also didn't work, he would do things to get suspended from school such as arguing and fighting with other students. (Tr. 156; [redacted]'s behavior is also addressed in the IEP for school year 1999-2000, Joint Exhibit 83-97). As the school year progressed, however, [redacted] began to enjoy school more, and didn't act-out as he had at the beginning of the year (Tr. 156). His truthfulness also improved (Tr.166-167) Ms. Dubose testified that there was no circumstance where she had used physical restraint against [redacted], nor was she aware that Ms. Grant had ever restrained [redacted] (Tr. 166) She described physical restraint as a "last resort intervention if there is a crisis." (Tr.200)

15. Based on the content of their testimony and observation of their demeanor, the ALJ finds that Ms. Grant and Ms. Dubose were both credible witnesses.

III. Discussion and Conclusions of Law

1. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, provides that any identified disabled student is entitled to receive special education and related services. IDEA states that, to the maximum extent appropriate, children with disabilities should be educated with children who are non-disabled. 20 U.S.C. § 1412(5)(b) and 334 C.S.R. Section

300. Therefore, the Petitioner must be provided a "free and appropriate education" ("FAPE") in the least restrictive environment. If it is alleged that a child has not been provided FAPE, then an impartial due process hearing may be requested. 20 U.S.C. § 1415.

2. In this matter, the Petitioner alleges that an act or acts of physical restraint not authorized by the IEP occurred, and the Respondent asserts that no such acts occurred (or, in the alternative, that such act or acts occurred outside the IEP prior for the current school year). The ALJ ruled that the Petitioner has the burden of persuasion and going forward with the evidence in this matter to show that a violation of IDEA occurred. OSAH Rule 616-1-2-.07. This ruling is supported by case law, including *Tatro v. Texas*, 703 F. 2nd 823, 830, *affirmed in part and reversed in part sub nom., Irving Independent. School District. v. Tatro*, 468 U.S. 883 (1984) ("because the IEP is jointly developed by the School District and parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate"). The standard of proof is by a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

3. As stated in paragraphs 12 and 15 of the Findings of Fact, the ALJ concluded that [redacted]'s testimony about the physical restraints allegedly used upon him was not credible, while the testimony of Ms. Grant and Ms. Dubose that [redacted] was not physically restrained was credible. Therefore, the Petitioner has not met his burden of persuasion and going forward with the evidence to prove it is more likely than not that the Respondent School District imposed any form of physical restraint upon him during the 1999-2000 school year.

4. Assuming, however, that the two alleged acts of physical restraint did in fact occur, the ALJ must agree with the School District that no relief can be granted under IDEA for acts of physical restraint in prior school years. In a decision cited by the School District, *Board of Education of Downers Grade School, District 58 v. Steven L., et al*, 89 F.3d 464 (7TH Cir. 1996), the circuit court held as follows:

> Andrew has graduated from eight grade and will enroll in high school this fall. This case concerns his fifth grade educational needs. Andrew's parents have already agreed to a new IEP with a different school district which will be in place when he enters high

> school. Accordingly...this Court has no remedy to grant Andrew's parents. Judgment either way would not affect Andrew's fifth grade IEP, a circumstance long gone. Thus, this case is moot.

In the present situation, the alleged acts of physical restraint happened, if at all, during the 1999-2000 school year, and were not brought to the School District's attention until April, 2001. An intervening IEP had already been prepared for the 2000-2001 school year, and if allegations of inappropriate or unauthorized physical restraint had been brought to the School District's attention, then the IEP could have addressed this potential problem. Further, during mediation in this case, the School District agreed to address any issues concerning physical restraint for the 2001-2002 school year. Any issue regarding the 1999-2000 is now moot.[2]

IV. Decision

It is the Final Decision of the Administrative Law Judge that the Petitioner's request for a due process hearing is DISMISSED, as (1) he has not met his burden of persuasion under OSAH Rule 616-1-2-.07; and (2) any issue of physical restraint during the 1999-2000 school year is moot.

Entered this 6th day of August, 2001.

M. Patrick Woodard, Jr.
Administrative Law Judge
Office of State Administrative Hearings

[1] The Administrative Law Judge underwent extensive knee surgery on June 6, 2001, which delayed issuance of this Final Decision.

[2] As this case is decided against the Petitioner based on Petitioner's failure to meet his burden of persuasion and going forward with the evidence and mootness of any justiciable issue, the ALJ concludes it is necessary to address the issue of whether or not damages and/or attorneys fees can be awarded.