#384A-02

S.R.R., on his own behalf and on behalf of minor child, S.R.,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION AND NEW JERSEY STATE BOARD OF EDUCATION,	:	
RESPONDENTS.	:	
	:	SYNOPSIS

Petitioner challenged Board's decision to permanently expel his 14-year-old son, S.R., when S.R. made threats against students and brought to school an inoperable BB gun to frighten J.D., a student S.R. asserts was bullying him. Petitioner's claims against the State were bifurcated from these proceedings.

ALJ found that the Board's removal and expulsion of S.R. pursuant to the Zero Tolerance for Guns Act was improper, where the District failed to make a finding that S.R, in fact, possessed a "firearm," as defined by *N.J.S.A.* 2C:39-1(f). Neither could the ALJ determine on this record that the inoperable BB gun was a "firearm." Additionally, the ALJ found as fact the testimony of experts who affirmed that S.R. poses a low risk of violence. Recognizing that S.R.'s misconduct was serious, the ALJ nevertheless concluded there were mitigating circumstances, such as his age and lack of prior disciplinary problems, which called for less severe alternatives to expulsion. The ALJ further found that the Board failed to follow its own procedures, resulting in a violation of S.R.'s right to due process. ALJ ordered that the Board reinstate S.R., expunge his records of any reference to an expulsion and provide him with compensatory services.

Initially, the Commissioner concurred that, under these circumstances, the Board could not properly remove or expel S.R. pursuant to the Zero Tolerance for Guns Act. Importantly, however, the Board could have taken action pursuant to its general powers to discipline students, as set forth in *N.J.S.A.* 18A:37-2. The Commissioner also concurred that the Board compromised S.R.'s right to due process when it failed to adhere to its own regulations. The Commissioner concluded that although the Board's decision to *initially remove* S.R. from school was not necessarily improper, under these circumstances, its decision to *permanently expel* him should be set aside. Noting that S.R. has been out of school for almost 13 months, the Commissioner considered the nature and severity of the offense; the Board's removal decision; the results of relevant testing and assessments; and the testimony affirming that S.R. would not be successful in an alternative education program. The Commissioner ordered that S.R. be reinstated in the regular education program; that his school records reflect the substance of the Commissioner's decision; and that S.R. be provided with compensatory services.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 1, 2002

OAL DKT. NOS. EDU 1914-02 AND EDU 5616-02
AGENCY DKT. NO. 35-2/02

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The record of this bifurcated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] Both parties filed exception and reply arguments in accordance with *N.J.A.C.* 1:1-18.4, which were considered by the Commissioner in reaching his decision.[2] Additionally, it is noted that, prior to the issuance of the Initial Decision, petitioner filed a Motion to Enforce the Commissioner's Emergent Order. However, the outcome of the decision herein obviates the need for the Commissioner to address petitioner's motion, which is, therefore, dismissed.

[1] The Initial Decision indicates that the issues relating to the State respondents have been bifurcated from those relating to the Roselle Borough Board of Education, and that all such claims shall be considered after the within matter is decided. (Initial Decision at 3, 4)
[2] The Board filed a reply to petitioner's reply arguments which was not considered by the Commissioner in that there is no provision in regulation for such a submission.

Upon careful and independent review of the record in this matter, including all exhibits, post-hearing arguments, transcripts from the hearings conducted at the OAL on June 24, June 28, July 1, July 2, July 3 and July 8, 2002,[3] as well as exception and reply arguments, the Commissioner determines to modify the Initial Decision, as set forth below.

Initially, the Commissioner concurs with the ALJ's conclusion that, under these circumstances, the Board could not properly remove or expel S.R. from its District pursuant to the Zero Tolerance for Guns Act, *N.J.S.A.* 18A:37-7 *et seq*.[4] As the ALJ duly observed, S.R. was neither "convicted" nor "adjudicated delinquent for possession of a firearm or a crime while armed with a firearm***." *N.J.S.A.* 18A:37-8; *N.J.A.C.* 6A:16-5.5(a). Therefore, in order to satisfy the remaining portion of the statute, S.R. would have to have been "knowingly in possession of a firearm***," as defined by *N.J.S.A.* 2C:39-1(f) and 18 *U.S.C.* §921, on school property, on a school bus or at a school-sponsored function before removing him N.J.S.A. 18A:37-8. (Initial Decision at 33)

Here, although case law supports the conclusion that a BB gun is a firearm, the situation was complicated by the undisputed fact that the pellet gun S.R. brought to school was inoperable, having neither a trigger nor a barrel. (Initial Decision at 8) Although these defects were readily apparent to S.R. when he found the BB gun (*id*. at 7), Security Officer Johnson believed it to be a real gun. (*Id*. at 8) Thus, as the ALJ noted in his discussion at pages 34 and 35, absent specific testimony with respect to the gun's current characteristics and function, it is impossible to determine on this record whether the object could fairly be considered a "firearm" within the legal definition of same. This question of fact was wholly ignored on the local level

[3] These transcripts are hereinafter referenced as T1: June 24, 2002; T2: June 28, 2002; T3: July 1, 2002; T4: July 2, 2002; T5: July 3, 2002 and T6: July 8, 2002.

[4] Because the Board could not properly expel or remove S.R. in accordance with *N.J.S.A.* 18A:37-7 *et seq*., the Commissioner finds no cause to reach petitioner's argument that the Zero Tolerance for Guns Act does not independently provide an independent statutory basis to expel a pupil. (Initial Decision at 32)

and the parties brought nothing to the record before the Commissioner to permit such a factual finding. Indeed, Board President McGarry testified that he was never aware of what kind of gun S.R. brought to school and the Board did not consider the legal definition of a firearm before it made its decision.[5] (T5 at 185, 188)

It is important to note, however, that notwithstanding the Board's avowed authority for removing and ultimately expelling S.R., namely, the Zero Tolerance for Guns Act, the Board *charged* S.R. *not* with possession of a firearm but with *unlawful possession of a weapon*. (*Id*. at 18).[6] In this regard, while the Board's November 16, 2001 letter providing notification of S.R.'s expulsion merely states, in pertinent part, "Please be advised that your son, [S.], has been expelled from the Roselle School District by a vote of the Board of Education and [sic] after a hearing before a hearing officer and the Board of Education" (Exhibit J-16), when pressed on the issue of the Board's failure to render factual findings with respect to its decision to expel S.R., Board President McGarry stated, "Based on the discussion and the way our vote was conducted, I believe that we sustained the charges." (T5:198) Therefore, to the extent the Board determined that S.R. was guilty of the unlawful *possession of a weapon*, that determination, under these circumstances, is sustainable. The Commissioner underscores, however, that action taken by a local board pursuant to such a finding would be authorized by its *general powers* to discipline as provided by *N.J.S.A.* 18A:37-2, rather than *N.J.S.A.* 18A:37-7 *et seq*., the Zero Tolerance for Guns Act, or *N.J.S.A.* 18A:37-2.1, the statute pertaining to a pupil's

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[5] Even assuming, *arguendo,* that the Board properly determined S.R. was in possession of a "firearm," the Commissioner observes, with great concern, that R5611 has not been revised since November 15, 1999. (Exhibit P-12) Notably, the State Board of Education adopted regulations on May 7, 2001, approximately *six months* before the date S.R. brought the BB gun to school, which establish *minimum standards* for district boards of education in developing policies and procedures regarding, for instance, school safety, intervention and referral services, alternative education programs, and home or out of school instruction for general educational students who are excluded for disciplinary reasons. Remarkably, there is no evidence on this record that the Board was aware of these prescriptions when it made the far-reaching decision to remove and later expel S.R. from its District. (T6: 9, 10)

[6] S.R. later pled guilty in a juvenile proceeding to fourth degree possession of a weapon. (Initial Decision at 35)

assault with a weapon.[7] Significantly, there is no requirement for *mandatory removal* of a student under this general statute.

The Commissioner concurs with the ALJ's discussion at pages 40 and 41 with respect to the factual disputes posed by the evidence that was before the Board when it considered the issue of S.R.'s threats to other students. Notwithstanding the existence of such factual disputes, however, S.R. now admits that on September 28, 2001, he told J.D. "[I]f he doesn't pay for [the knife] by Monday I will shoot him." (T5:20) Furthermore, it was undisputed when this matter was reviewed by the Board that S.R. sent the following e-mail to his friend J.R. on Monday evening, October 1, 2001 with the hope that J.R. would talk to J.D. and M.S. and they would be scared: (T5:24)

> yo why did do that for man now I have to kill another person so I need your help I will talk to you on Monday ok this stupid [J.] is afraid of gun man he is and You see that columbian one if the hair painted I am going to …….. him me and [j.] and all of my friend I don't need gun You know that when I went home I took the bus but before that I saw that columbin guy I don't know his name when he saw me he runs away I told him to come but he went to a store I was about to whip hi ass bro For real How about your ….ing best frind Bitch [j.] Why did he call his uncle is he afraid of me I never forgeive him and his friend You will see that tommorrow alrigth You too man are you on my side or on their side tell so I can see
> alrigth see ya
> [s.] the man who is not afraid of anything
> what?who?why?how? (R-1 at Exhibit 6)

Based on the existence of the e-mail alone, it was not unreasonable for the Board to conclude that "On or about October 2, 2001, [S.R.] threatened three (3) students with bodily harm with a weapon by threatening to bring a gun to school and kill them." (Charge #2, Initial Decision at 18) That S.R.'s e-mail was directed at two students rather than three is not material. It was

[7] The Commissioner concurs with the ALJ that this record *does not* support the conclusion that S.R. committed an "assault," as defined by *N.J.S.A.* 2C:12-1(a).

prudent for the Board to view S.R.'s e-mail as lending a serious and urgent context to his decision to bring a weapon to school.

Finally, the Commissioner affirms the ALJ's discussion of general due process principles found on pages 27 and 28 of the Initial Decision, as well as his more specific findings at pages 38-42, including his findings that the Board did not comply with its own regulations.

The Commissioner recognizes that where a local board of education acts within its discretionary powers, its decision is entitled to a presumption of correctness and may not be disturbed unless "there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." *Thomas v. Bd. of Ed. of Morris Twp*., 89 *N.J. Super*. 327, 332. Here, the Board failed to affirmatively determine that the object carried by S.R. was, in fact, a firearm, within the meaning of *N.J.S.A.* 18A:37-8, before it acted to expel him; rigidly adhered to a set of procedures, R5611, which were not applicable to this unique circumstance and, as footnoted, *supra*, did not even appear to incorporate the most recent regulations promulgated by the State Board of Education on such critical matters; and failed to adhere to its own policies and procedures, thereby compromising S.R.'s right to due process, most notably, by failing to produce the accusing students as witnesses for testimony and cross-examination. Under these circumstances, the Commissioner determines that although the Board's decision to initially remove S.R. from school was not necessarily improper, as discussed, *infra*, petitioner has demonstrated that the Board's decision to thereafter *permanently expel* S.R. was sufficiently laden with substantive and procedural infirmities so as to allow the Commissioner to properly set it aside.

S.R. has now been out of school for almost 13 months. In the Commissioner's analysis of what is now the appropriate course of action, he finds instructive, *although not*

compelled by the circumstances herein, the guidelines established by the State Board of Education for chief school administrators (CSA) when determining whether a student is prepared to return to the regular education program upon his removal for either a firearm offense or an assault with a weapon. Under such circumstances, the CSA must consider:

1. The nature and severity of the offense;
2. The district board of education removal decision;
3. The results of any relevant testing, assessments or evaluation of the student; and
4. The recommendation of the principal or director of the alternative education program or home or other out-of-school instruction program in which the student has been placed. (*N.J.A.C.* 6A:16-5.5(g) and 6A:16-5.6(g))

Here, the nature of S.R.'s offense was quite serious, albeit that such conduct constituted a first offense for a student with no history of violent or aggressive behavior. S.R. brought a weapon to school which he intended to use to frighten students. Although S.R. knew he could not hurt anyone with the inoperable BB gun, the targeted students could not have known his true intent, and were understandably alarmed by his threats. Moreover, the Commissioner is not unmindful that this object, despite its defects, apparently did, to some, *look* like a gun. As the Board persuasively argues, the presence of such a weapon "on school property creates a disruptive atmosphere of fear and panic which is inimical to learning ***." (Board's Exceptions at 19)

Although the Board's initial removal decision was driven by an incorrect application of the law, S.R.'s removal from the regular education program, *while not mandated*, was also not unwarranted. Indeed, under such compelling circumstances, it would not have been unreasonable to remove S.R. from the regular education program for a period of time sufficient

to allow the Board to thoroughly evaluate the potential risk he posed to himself and others, as well as to impress upon S.R. the gravity of his offense. Having so found, the Commissioner underscores that, during the period of S.R.'s removal from the regular education program, he should have been provided *no less than* the educational services required when a student is removed pursuant to *N.J.A.C.* 6A:16-5.5 and 5.6 and in accordance with *N.J.A.C.* 6A:16-8 and *N.J.A.C.* 6A:16-9.

The Commissioner also considers relevant the assessments that have been performed on S.R., as summarized in the Initial Decision. Notably, the ALJ found the substance of the witnesses' testimony as fact, and the Board presents no testimony to refute the witnesses' conclusions that S.R. does "not appear to be [in] any imminent or acute risk for a recurrence of violence" and that he "presents a low risk of violence." (Initial Decision at 21, 22, 23) Dr. Witt clearly reported that S.R. "shows virtually none of the characteristics associated with individuals who present a risk of violence to others." (Exhibit P-16 at 8)

Case law has, indeed, established that "[t]ermination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible." *Scher v. West Orange Board of Education*, 1968 *S.L.D.* 92, 96. As such, the Commissioner has urged boards of education "to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation." (*Id*. at 97)

It is also important to note that at the time of the offense, S.R. was 14 years old. Notably, the State Board has set aside a local board's decision to expel a student, where it was found that the local board did not accord adequate weight to the fact that the student was only 12 years old at the time of the incident and, therefore, could not have "sufficiently appreciated the

nature and potential consequences of her conduct ***." *C.S., on behalf of minor, K.S. v. Board of Education of the Township of Piscataway*, *Middlesex County*, 97 *N.J.A.R.*2d (EDU) 573, *aff'd* State Board April 1, 1998, slip op. at 4-5.

Further, the Commissioner considers persuasive the opinions from petitioner's witnesses who affirm that S.R. would not be successful in an alternative education program, that he needs ESL program support, which is not a component of the alternative education program operated by the Union County Educational Services Commission, and that he "has the ability to be successful in a strong academic program ***." (Initial Decision at 21, 22; Exhibit P-2) Additionally, although S.R. has been receiving home instruction, this instruction is not equivalent to what he would have received in his second year in the ESL program. (T3:60)

Therefore, based on the total record before him, the Commissioner finds that S.R. shall immediately be reinstated in the regular education program; his school records shall reflect the substance of the determination herein. In so determining, and mindful that he may consider the results of any relevant testing, assessments or evaluation of S.R., the Commissioner highlights, for the Board's consideration *and appropriate follow-up*, a portion of the recommendations made by Dr. Lee, pursuant to S.R.'s court-ordered psychological assessment on January 23, 2002. Dr. Lee recommends that during S.R.'s 12-month term of probation as ordered by the Court,

> [S.] should be provided an opportunity to receive more positive and prosocial interactions through supportive or therapeutic recreational activities. Programs such as YAP, Mentor, or Big Brother appear a positive opportunity to help him acclimate and adjust to a new culture and environment while feeling accepted and supported. A period of supportive individual counseling can also provide him some additional supports in trying to adapt and acclimate to a new culture and feel supported and accepted. *** As [S.] develops mastery of English, he might also be recommended to complete an anger management program.*** He tends to be

> particularly conforming, and placing him in a group with a high prevalence of behaviorally disordered children may lead him to conform to these more behaviorally disturbed patterns. In this respect, every effort should be made to try to return him to a regular education setting. However, as could be appreciated from the cultural changes, some supportive counseling services through the attending school should be made to help him adjust and acclimate to his new environment. Perhaps providing him a school-based "buddy" or mentor from an older grade could be of help. [S.'s] case might particularly benefit from referral to the local care management organization in terms of the added resources and flexibility to meet this young man and his family's particular needs. (Exhibit J-23 at 6, 7)

Further, based on the uncontested testimony of Ms. Frost-Guzzo, the Commissioner directs that S.R. receive compensatory services in order to help him reach competencies consistent with his appropriate grade level.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: November 1, 2002

Date of Mailing: November 1, 2002*

*Not published until February 2003. Decision and record previously sealed, but decision unsealed, on petitioner's application, by letter determination dated January 8, 2003 (#15-03L). Record remains sealed.

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[8] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.