239-04 (Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu02384-04_1.html)

C.A. AND B.A., on behalf of G.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE TOWNSHIP, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents challenged the Board's charges against high school senior, G.A., and contested the severity of the suspension penalty imposed.

In light of testimony of witnesses and the record, the ALJ found that the Board had good cause to discipline G.A. since he brought two knives to school and he threatened student M.P. The ALJ determined, however, that G.A. did not commit an assault on M.P. on school property. *N.J.S.A.* 18A:37-2.2 did not apply since G.A. violated a lesser statute, *N.J.S.A.* 18A:37-2c. The ALJ agreed that the Board's penalty of suspension from school and G.A.'s placement on the restricted activities list was not arbitrary and capricious because it would be difficult to supervise G.A. at activities involving crowds. The ALJ found, however, that commencement is a tightly controlled event so barring G.A. from that event was arbitrary, capricious and without rational basis. The ALJ ordered G.A. be permitted to participate in commencement, that remaining sanctions be affirmed and home instruction continue.

The Commissioner modified the Initial Decision. The Commissioner determined that, as a result of G.A.'s serious transgressions, the Board did not abuse its discretion in restricting G.A.'s participation in, or attendance at, any school-sponsored extracurricular activities and, contrary to the ALJ, determined that such extracurricular restriction may reasonably extend to commencement exercises.

June 11, 2004

OAL DKT. NO. EDU 2384-04
AGENCY DKT. NO. 111-3/04

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V.	:	COMMISSIONER OF EDUCATION
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and the petitioners' reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board contends that the ALJ erred in concluding that G.A. had not committed an assault on M.P. as contemplated by *N.J.S.A.* 18A:37-2.2. (Board's Exceptions at 3) In this regard, the Board argues that "the ALJ improperly divorced G.A.'s conduct in bringing two knives to school on February 19, 2004 from the specific threats recorded in the Internet chat on February 18, 2004." (*Id.* at 4) The Board continues:

> The ALJ found that the Board could reasonably conclude on these facts that G.A.'s threats during the Internet chat – to bring a knife to school and to cut various parts of M.P.'s body – were intended to put M.P. in fear of imminent bodily harm. *** If that finding is reasonable, it supports the Board's decision that G.A. committed an assault as that offense is defined at *N.J.S.A.* 2C:12-1(a)(1). *** More troubling, the morning after making his very specific threats, G.A. came to school with a knife which was seen by M.P. While the factual testimony of M.P. and G.A. at the March 9, 2004 hearing before the Board was in some measure divergent, G.A. testified clearly that he had a knife on February 19, 2004 and M.P.

> testified clearly that he saw the knife in G.A.'s hand that same day. The threat from the evening of February 18, 2004 coupled with G.A.'s possession of a knife on February 19, 2004 and his decision to take the knife out of his pocket in a manner that would have allowed M.P. to see the knife rises to the level of an assault with a weapon on school grounds that warrants disciplinary action against G.A. (*Id*. at 4-5)

In reply, petitioners counter that the ALJ correctly determined that G.A. had not committed an assault on M.P. so as not to be subject to discipline pursuant to *N.J.S.A.* 18A:37-2.2. (Petitioners' Reply at 1) Petitioners review the ALJ's factual findings in this regard and argue, in pertinent part:

> Nothing in any of the testimony suggest[s] that G.A.'s actions amounted to "physical menace" which placed M.P. "[i]n fear of *imminent* serious bodily injury" (emphasis added). Had G.A. opened the knife, there might be a stronger basis for respondent's action, but it is uncontroverted that the knife remained closed. ***
>
> The fact that G.A. briefly showed the closed knife to V.A. and in no way "brandished" it at M.P., or threatened M.P. with the knife in any way, makes it abundantly clear that G.A. did not attempt physical menace to put M.P. in fear of imminent serious bodily injury, and makes it clear there was no assault. (*Id.* at 2)

The Board next contends that the ALJ's decision to vacate G.A.'s restriction from commencement exercises impermissibly intrudes upon its authority to impose reasonable discipline, and impermissibly substitutes the ALJ's judgment for that of the Board. (Board's Exceptions at 6) Underscoring that it is petitioners' burden to demonstrate that the Board's action is improper, arbitrary or capricious, the Board stresses that the ALJ found that it *did* have good cause to discipline G.A. Furthermore, the Board imposed this restriction after a full hearing. Therefore, while the Board acknowledges that "[commencement is a seminal right of passage in our society, not only for the graduate, but also for his family," (*id.* at 7, citing Initial Decision at 14) it charges that "the ALJ is not ordinarily, and on these facts cannot be, permitted

to elevate the interests of G.A.'s family above the reasonable determinations made by the Board of Education." (*Id*. at 7)

To this, petitioners reply that because the ALJ has the authority to determine whether discipline imposed upon a student is arbitrary and capricious, he may also modify or set aside such discipline. (Petitioners' Reply at 2) Although petitioners are cognizant that the school year is nearing an end, they nevertheless maintain their position that G.A. should have been returned to the regular school setting, and that the Board's failure to conduct any professional evaluations of him so as to inform its conclusion "that G.A. constituted 'a continuing danger to the physical well-being of the *** students' (P-3)" (*id*.) renders its removal decision arbitrary and capricious. In support of this contention, petitioners cite to the State Board of Education's decision in *P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, Bergen County, David Hespe, Commissioner, and New Jersey State Board of Education*, State Board decision, October 3, 2001. Thus, petitioners reason, there is no rational basis to exclude G.A. from his graduation ceremony, since there is no finding that he is a danger to anyone and the Board's disciplinary decision, based on "an assault that never occurred" was arbitrary and capricious.

Upon careful and independent review of the record herein, the Commissioner determines to modify the Initial Decision, as set forth below.

As the Initial Decision indicates, subsequent to a "shoving match" which took place between G.A. and M.P. on February 18, 2004, the boys engaged in a "conversation" on the internet the same night. Although the ALJ remarks that "[t]he transcript [of the conversation] reveals what on one level could be considered a typical example of teen-age male bravado ***"

(Initial Decision at 3), the Commissioner does not so lightly characterize the exchange, as it follows below.[1]

> M.P.: you know, i didnt do anything to u but i was not say fag first, u were started w/it to pushed me
> M.P.: then i called u a fag then u look like u were gonna 2 beat me up
> G.A.: tell him i have a knife and im gonna chop off his pee pee[2]
> M.P.: but u got w/secuirty
> G.A.: so what
> G.A.: he didn't do anything when i pushed
> G.A.: so next time I will take out my knife and slice u
> M.P.: oh really
> M.P.: i bet u wouldnt do ever in ur life
> G.A.: wanna bet
> G.A.: start shit with me tomorrow and see what happens
> M.P.: oh okay
> ***
> G.A.: yea bitch
> ***
> G.A.: do u think i care if i go to jail
> G.A.: i'm gonna chop off ur dick and feed it to u
> M.P.: oh okay
> ***
> G.A.: then shove ur nuts up ur poop shooter
> ***
> M.P.: your so damn nasty
> G.A.: ur never ever gonna get any p_____
> G.A.: ur mos homosexual
> G.A.: ur mos scared too
> M.P.: shut up and leave me alone
> M.P.: you really cant do anything to me DUH
> G.A. : yea why cant i?
> M.P.: cause ur kiddin me
> M.P.: ur not serious said all of this to me
> ***
> G.A.: says who
> G.A.: i am goin to get u!
> M.P.: oh go ahead
> G.A.: alrite
> G.A.: tomorrow ur dead
> M.P.: oh haha NO

[1] The students' initials are used, rather than their respective internet screen names.
[2] Apparently, segments of the Internet conversation took place between G.A. and V.M., and the messages were then forwarded to M.P. (Exhibit J-1 at 52)

G.A.: i will show u my knife before i slice ur face off
G.A.: u keep sayin stupid shit and i will kill u
G.A.: ur dead u f_____ faggot
(Exhibit R-1)

Although the ALJ observes that "Taken by itself, this example of excessive teen-age testosterone would not involve this Court or the Department of Education,***" (Initial Decision at 4) the Commissioner disagrees. G.A.'s statements *alone* can well be considered expressive behavior which hints at future violence, such that school officials may be concerned. Notwithstanding that G.A.'s declarations were from his home and projected into cyberspace, to the extent school officials reasonably believed that such speech could "substantially interfere with the work of the school or impinge upon the rights of other students," it is not likely to be protected by the First Amendment, *Tinker v. Des Moines School Dist*., 393 U.S. 503, 510 (1969); it may fairly be considered grounds for imposing serious sanctions, *R.R. v. Bd. of Ed., Shore Reg. H.S*., 109 *N.J. Super*. 337, 344 (Chan. Div. 1970); and it could not, from any responsible perspective, given the numerous, and even catastrophic, acts of violence that have occurred at schools in recent years, be dismissed as merely an example of "excessive teen-age testosterone." Indeed, a reasonable person may well interpret the words, which were specifically directed and delivered to M.P., as a serious expression of the intent to cause either present or future harm, so as to constitute a "true threat." *Doe v. Pulaski County Special School Dist*., 306 F.3d 616 (8th Cir. 2002) (*en banc*).

That G.A. chose to exacerbate this behavior by bringing two knives to school the next day only serves to render his misconduct more flagrant, giving the appearance, for all those charged with evaluating and responding to the situation, that G.A. was signaling an intent to act on the threats made the night before to M.P. Given the ALJ's factual findings with respect to the events that took place at G.A.'s locker, however, which are supported by the record herein,

the Commissioner is constrained to agree that G.A.'s behavior, although sufficiently flagrant to warrant severe penalty, falls short of constituting an "assault" on M.P. on school property, on a school bus, or at a school sponsored function, in violation of *N.J.S.A.* 18A:37-2.2.[3]

Notwithstanding, as noted by the ALJ, respondent had good cause to discipline G.A. pursuant to *N.J.S.A.* 18A:37-2c. Significantly, although there is no requirement for *mandatory* removal under *N.J.S.A.* 18A:37-2c, the general statute which provides authority for the Board's disciplinary action, (Initial Decision at 11), the Commissioner finds that the Board's decision to *immediately* remove G.A. was not, under these circumstances, arbitrary, capricious and unreasonable. The nature of G.A.'s offense was quite serious. G.A. threatened to "chop" and "slice" various body parts of M.P., as well as to kill him, and it was prudent for the Board to view these threats as lending a serious and urgent context to G.A.'s subsequent decision to actually bring knives to school. Indeed, notwithstanding the phrasing of its "charges" to include an assault, the Board's letter to petitioners affirms that G.A.'s "external suspension is based on charges that [G.] possessed weapons (to wit two knives) on school property and made terroristic threats against student M.P. on February 19, 2004 (sic)." (Exhibit P-3) Therefore, the Commissioner finds that although the Board's initial removal decision was driven by an incorrect application of the law, G.A.'s removal from the regular education program, was not unwarranted.

[3] To the extent the Board argues that its *initial* removal of G.A. from school was pursuant to *N.J.S.A.* 18A:37-2.2, it was bound by that statute, and its implementing regulations, to place G.A. in an alternative education program meeting the requirements of *N.J.A.C.* 6A:16-8. *N.J.A.C.* 6A:16-5.6(d). If such an alternative education program was not available, G.A. was to be placed on home instruction, according to *N.J.A.C.* 6A:16-9, until an alternative education placement became available. *N.J.A.C.* 6A:16-5.6(d)1. In this connection, the Commissioner notes that there is nothing in the Board's papers which acknowledges the mandates set forth in *N.J.A.C.* 6A:16-5.6 *et seq*., which must now be read in light of the State Board's decision in *P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, Bergen County, David Hespe, Commissioner, and New Jersey State Board of Education*, State Board decision, July 2, 2002.

As for G.A.'s *continued* suspension from school, the Commissioner is not persuaded on this record that petitioners have demonstrated by a preponderance of credible evidence that placing him on a program of home instruction for the balance of the school year was an abuse of the Board's discretion, particularly where petitioners acknowledge that the Board "has a policy that permits a student to be suspended up to one year for the possession of a weapon." (Petitioners' Motion for Emergent Relief at 4)[4] Moreover, although until recently his disciplinary infractions may have been characterized as "minor," G.A.'s record is not unblemished and, in fact, the Board was about to suspend him for being under the influence of marijuana in school in violation of *N.J.S.A.* 18A:40A-12 at the time this incident took place. While choosing to focus primarily on the question of whether an assault took place in school, petitioners appear to lose sight of the compelling facts that G.A. (1) threatened M.P. in a manner sufficient to warrant criminal charges and (2) brought two knives to school the next day.

Further, it is important to consider the Board's decision to restrict G.A.'s participation in extracurricular activities separate from its decision to remove him from the regular education program, since a student's entitlement to a through and efficient education does not, as a general principle, extend to extracurricular activities. More specifically, exclusion from attendance at graduation exercises, because it is a privilege and not a right, has long been upheld in discipline cases. *See, e.g., C.B., on behalf of minor child, L.B. v. Board of Education of the Eastern Camden County Regional School District, Camden County*, Commissioner decision No. 191-01L, June 15, 2001 (Student prohibited from attending extracurricular activities, including graduation ceremony, for shoplifting in Disney World on class trip); *Nicholas Dentino v. Board of Education of the Borough of Haddonfield, Camden County*, Commissioner Decision No. 161-00E, May 19, 2000 (Student suspended for remainder of the

[4] The Commissioner notes that this policy was not brought to the record.

school year for vandalizing the school was properly excluded from graduation exercises); *C.S., on behalf of minor child, C.O. v. Board of Education of the Lower Camden County Regional High School District Number One, Camden County*, Commissioner Decision No. 299-98, July 8, 1998 (Board's suspension of senior for one year for possession of marijuana on school grounds, including denial of participation in activities such as graduation exercises, upheld as reasonable and appropriate); *D.D., on behalf of minor L.D. v. Board of Education of the City of Ocean City, Cape May County*, Commissioner decision No. 262-96EL, June 19, 1996 (Student denied participation in graduation ceremonies for violation of substance abuse policy); and *B.G., B.B. and Deborah Van Pelt v. Board of Education of the Borough of Elmwood Park*, 1974 *S.L.D.* 611 (Petitioners, all suspended five times during the school year for "cutting" classes, were properly barred from attending graduation ceremonies).

Based upon the facts on this record, the Commissioner determines that the Board did not abuse its discretion in restricting G.A.'s participation in, or attendance at, any school-sponsored extracurricular activities and, contrary to the ALJ's finding, determines that such extracurricular restriction *may reasonably extend to commencement exercises.*[5] Notwithstanding that graduation may be "a seminal right of passage" both for G.A. and his family (Initial Decision at 14), the honor of participating in his graduation ceremony is one that G.A. must justifiably forfeit as a result of his serious transgressions; his remorse, at this stage, is simply insufficient to overcome the Board's presumption of correctness.

[5] The Commissioner also concurs with the ALJ that there is nothing arbitrary, capricious and unreasonable about the Board's decision to enjoin G.A. from any contact with M.P., or from causing any person to threaten, harass or intimidate M.P. on his behalf.

Accordingly, the Initial Decision is modified as set forth herein. The sanctions imposed by the Board on March 9, 2004 are affirmed and home instruction is to continue in accordance with the order of the ALJ.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: June 11, 2004
Date of Mailing: June 11, 2004

[6] This decision 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.*