EDU #8778-96
C # 274-97
SB # 56-97

C.S., on behalf of minor, K.S.,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 19, 1997

For the Petitioner-Cross/Appellant, Kalac, Newman, Lavender & Campbell (Francis J. Campbell, Esq., of Counsel)

For the Respondent-Appellant, David Rubin, Esq.

On March 22, 1996, K.S., a 12-year-old seventh-grade student at the Quibbletown Middle School, sold another seventh-grade student a substance which K.S. believed to be lysergic acid diethylamide (LSD), a controlled dangerous substance, on school grounds. Although the student who purchased the substance appeared to experience a drug-induced hallucinatory episode, subsequent laboratory analysis did not indicate the presence of a controlled dangerous substance. However, K.S. admitted that she had intended to sell LSD. The Board of Education of the Township of Piscataway (hereinafter "Board") suspended K.S. from school and provided her with home instruction pending further disciplinary proceedings. The child

study team determined that the incident was not caused by a learning disability or other handicap. As a result of that incident, K.S. subsequently pleaded guilty in Middlesex County family court to a charge of distributing an imitation drug. N.J.S.A. 2C:35-11.

Following a hearing on June 18, 1996, the Board determined by a 6 to 3 vote to expel K.S. from the district. The Board issued its written findings and determination on June 27, 1996. Pursuant to its policy, the Board provided K.S. with home instruction commencing in September 1996.

On October 17, 1996, petitioner C.S. filed a petition of appeal and a motion for emergent relief on behalf of her daughter K.S. with the Commissioner of Education, seeking a directive requiring the Board to reinstate K.S. to her regular school program. On October 29, 1996, an Administrative Law Judge ("ALJ") denied petitioner's request for emergent relief and scheduled the matter for plenary hearing.

On April 2, 1997, another ALJ assigned to hear the case dismissed the petition, finding that petitioner had failed to satisfy her burden of demonstrating that the Board's action in expelling K.S. was arbitrary, capricious or unreasonable. The ALJ stressed that K.S. had intended to sell a dangerous illegal drug on school grounds and noted that the Board, in determining to expel K.S., had taken into consideration K.S.'s age; the fact that there had been no prior instances of disciplinary action taken against her: that K.S. was remorseful about her behavior; and that K.S. was apparently trying to emulate her sister, from whom she had apparently received the substance. Consequently, the ALJ recommended upholding the expulsion, finding that the nature and severity of the offense, as well as the potential risk of harm to other students, was not outweighed by the mitigating factors.

On May 19, 1997, the Commissioner rejected the ALJ's recommendation, concluding that the Board's action in expelling K.S. was arbitrary and unreasonable. While recognizing the Board's need to take a firm disciplinary stance against drugs, the Commissioner concluded that its action to expel a 12-year-old student against whom it had never taken previous disciplinary action was unreasonable, notwithstanding that it was providing her with home instruction. The Commissioner found that K.S.'s age was a critical consideration "both because her expulsion from the school system effectively truncates her entire secondary public school experience and because a twelve-year-old cannot reasonably be expected to fully comprehend the implications of such a sanction, notwithstanding that she may have been aware of the district's 'zero tolerance' policy." Commissioner's Decision, slip op. at 15. In addition, the Commissioner found that the Board had failed to consider local and county-based alternative education programs designed to remove a disruptive student from a regular education program. Thus, the Commissioner concluded that the Board's action in expelling K.S. was unreasonable under the circumstances and could not be upheld. He therefore directed the Board to continue to provide K.S. with home instruction through the 1996-97 school year and to evaluate K.S. prior to the 1997-98 school year for the purpose of finding a suitable local or county-based alternative education program for her.

The Board filed the instant appeal to the State Board, arguing that petitioner had failed to demonstrate that its action was arbitrary, capricious or unreasonable. Petitioner filed a cross-appeal, contending that the Commissioner, in view of his decision, should have directed the Board to reinstate K.S. to her regular school program.

After a careful review of the record, we affirm with clarification the decision of the Commissioner.

As noted by the ALJ, action of a district board which lies within its discretionary powers may not be upset unless it is shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). The scope of this agency's review is not to substitute our judgment for that of the district board but to determine whether the underlying facts were as the board claimed and whether it had a reasonable basis for its conclusion. The burden of proving unreasonableness is on the appellant. Kopera, supra.

In this case, it is undisputed that K.S. intended to sell a controlled dangerous substance to another student on school premises, notwithstanding the fact that laboratory analysis did not confirm the presence of an illegal substance. While the applicable legal standard precludes us from substituting our judgment for that of the Board, we find that petitioner has demonstrated that the Board did not have a reasonable basis under the particular facts of this case for its decision to expel K.S. from the district. We emphasize, like the Commissioner, that K.S. was just 12-years-old at the time of the incident. Although the Board did give some consideration to K.S.'s age, we find that it did not give sufficient weight to this factor. Rather, the Board's decision was geared more towards the fact that K.S. had "just completed seventh grade, and that expulsion would require her family to arrange for up to five years of secondary education elsewhere." Decision of Piscataway Board, at 5. The Board

added that "[t]his factor may have carried more weight...had there been evidence that [K.S.'s] age had a bearing on her appreciation of the nature of her conduct." Id. at 5-6.

We find that K.S.'s age cannot be so lightly discounted. There is nothing in this record that would lead us to believe that this particular twelve-year-old sufficiently appreciated the nature and potential consequences of her conduct, particularly in an instance in which she may have been attempting to emulate an older sibling. Indeed, the Board notes that the incident has had "a meaningful impact" on K.S. Id. at 5. "She was processed through the juvenile justice system, placed in detention where she spent her thirteenth birthday, and remained confined to her home until her sentencing...." Id. Nor is there any indication that K.S. had been subject to any previous disciplinary action in the district.

We stress that our decision rejecting expulsion in this case is not intended in any way as an indictment of the Board's "zero tolerance" policy towards drugs. To the contrary, we commend the Board for its aggressive stance on the use of illegal drugs. Nor would our decision today preclude the Board from expelling a student under its "zero tolerance" policy under a different set of circumstances. Rather, after careful consideration of the facts in the record before us, we find that the Board did not have a reasonable basis for its determination that the appropriate disciplinary action in this particular instance was the ultimate sanction of expulsion from the district.

Consequently, as clarified herein with regard to the legal standard, we affirm the decision of the Commissioner reversing the Board's decision to expel K.S. In so doing, however, we reject petitioner's contention that the Board should be required to reinstate K.S. to her regular school program at this time. Given the nature of K.S.'s offense, we

direct the Board to evaluate K.S. for the purpose of finding an appropriate local or county-based education program for her.

S. David Brandt opposed.

April 1, 1998

Date of mailing _____