EDU # 7381-00
C # 304-00
C # 219-01
SB # 60-00 and 27-01 (consolidated)

P.H. and P.H., on behalf of minor child, M.C.,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, DAVID C. HESPE, COMMISSIONER, AND NEW JERSEY STATE BOARD OF EDUCATION,	:	
RESPONDENTS-RESPONDENTS,	:	
AND	:	
P.H. and P.H., on behalf of minor child, M.C.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 15, 2000

Decision on motion by the Commissioner of Education, January 22, 2001

Decision on motion by the Commissioner of Education, January 26, 2001

Decided by the Commissioner of Education, July 16, 2001

Decision on motion by the State Board of Education, September 5, 2001

Decision on motions by the State Board of Education, October 3, 2001

For the Petitioners-Appellants, Education Law Center (Elizabeth Athos, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Bergenfield, Schenck, Price, Smith & King, L.L.P. (Joanne Butler, Esq., of Counsel)

For the Respondent-Respondent David C. Hespe, Commissioner, and New Jersey State Board of Education, Todd Schwartz, Deputy Attorney General (David Samson, Attorney General of New Jersey)

The central issue in this appeal is whether a student who is permanently expelled by a district board of education is entitled to be provided with an alternative education program. This is the first time we have been confronted with this issue, and we have approached the question from both a legal and an educational policy perspective. In doing so, we have been mindful both of our responsibility for ensuring that all of New Jersey's children are afforded a thorough and efficient education and of the societal implications if we were to fail in that responsibility. As follows, we have concluded that a student must be afforded the opportunity to obtain a public education even when he has been appropriately excluded from the regular education program. To conclude otherwise would not only be shortsighted, but would also be an abrogation of our responsibilities.

I.

The student involved in this case, M.C., was a fifteen-year-old sophomore at Bergenfield High School who was permanently expelled by the Bergenfield Board for slashing at another student with a box-cutter, causing a gash in that student's coat, and

for being in possession of four box-cutters and a Swiss army knife. The petitioners, M.C.'s parents, challenged his expulsion by filing a petition of appeal with the Commissioner. The matter was then transmitted to the Office of Administrative Law for hearing.

Prior to the hearing, petitioners sought emergent relief, which the Administrative Law Judge ("ALJ") granted on August 18, 2000. The ALJ's order directed the Bergenfield Board to immediately assess M.C.'s alternative education needs, to identify an appropriate alternate education program for him, and to place him in such program no later than the first day of the 2000-2001 school year. On September 15, 2000, the Commissioner issued his determination, modifying the relief which the ALJ had directed. Concluding that placement in an alternative educational setting was not an appropriate grant of interim relief, the Commissioner directed that M.C. be provided with home instruction until the underlying case was decided.

On October 12, 2000, petitioners appealed to the State Board from the Commissioner's determination denying M.C.'s placement in an alternative education program while the underlying case was being decided. However, they then requested that their appeal be placed in abeyance pending the Commissioner's decision on the merits of that case.

On May 25, 2001, the ALJ issued his initial decision on petitioners' challenge to M.C.'s expulsion. Stressing that New Jersey's statutory and regulatory scheme does not explicitly address the provision of an alternative education following expulsion, the ALJ declined to address petitioners' claims that the Board's policy of permanent expulsion without the provision of alternative education violated M.C.'s right under the

education clause of the New Jersey State Constitution to a thorough and efficient free public education and the equal protection guarantees of the State Constitution. However, the ALJ concluded that the school district's failure to consult with appropriate sources before permanently expelling M.C. without an alternative education program was arbitrary, capricious and unreasonable. He further concluded that the district should conduct evaluations pursuant to N.J.A.C. 6A:14-1.1 on an expedited basis to determine whether M.C. was a child with a disability and, if he was, that the district should follow the disciplinary procedures for classified students. The ALJ also concluded that M.C. should remain on home instruction as the Commissioner had directed in his September 15, 2000 determination pending the outcome of the evaluations. However, he found that if the evaluators concluded that M.C. was not a child with a disability, the Board's action in expelling M.C. was not arbitrary, capricious or unreasonable.

The Commissioner concurred with the ALJ that petitioners' challenge to the constitutionality of the Board's policy was more appropriately addressed by the courts. He also rejected petitioners' contention that the Board's failure to provide alternative education following M.C.'s permanent expulsion was arbitrary, capricious or unreasonable. However, he rejected the ALJ's determination that the District should conduct evaluations to ascertain whether M.C. was a child with disabilities, finding that he did not have the jurisdiction to reach such a conclusion. Therefore, concluding that he had no cause to substitute his judgment for that of the Board, the Commissioner "denied petitioners' appeal for a ruling that the District's expulsion of M.C. was arbitrary, capricious or unreasonable." Commissioner's Decision, slip op. at 59.

Petitioners appealed to the State Board from the Commissioner's decision, requesting that this appeal be consolidated with their earlier appeal. In addition, petitioners filed the motion for emergent relief seeking a directive that the Bergenfield Board assess M.C.'s alternative education needs and identify an appropriate alternative education program that would meet his needs and satisfy New Jersey's Core Curriculum Content Standards. They also sought to have the Bergenfield Board bear the expense of such program, including any necessary transportation.

On September 5, 2001, we directed that M.C. be afforded emergent relief pending our decision on the merits of the underlying case. Specifically, we directed the Bergenfield Board to immediately assess M.C.'s alternative education needs and to effectuate M.C.'s placement in an appropriate alternative education program. Although the relief we directed was to be effective as of the first day of the 2001-02 school year, we directed that in the event that M.C.'s placement in an alternative program could not be effectuated by that date, the Bergenfield Board was to provide M.C. with home or out-of-school instruction until an appropriate placement could be arranged.

On September 10, 2001, the Bergenfield Board sought reconsideration of our decision of September 5 and a stay of that decision.

On September 13, 2001, petitioners moved for enforcement of the State Board's decision.

Reconsideration of our decision reinforced our conclusion that the Bergenfield Board had to provide M.C. with an alternative education placement during the pendency of the underlying case. We also found that the Board's failure to even begin the process of effectuating M.C.'s placement in an appropriate alternative education

program until September 28 made it imperative that the decision be fully implemented immediately. We therefore denied the Board's motion for a stay and directed that the Commissioner of Education take all measures necessary to ensure that the Bergenfield Board complied immediately with our decision of September 5.

By motion filed on September 25, the Bergenfield Board sought leave to appeal to the Appellate Division from our grant of emergent relief. On October 18, 2001, the Appellate Division denied that motion.

In the interim, the Bergen County Superintendent of Schools began the process of insuring the implementation of our September 5 decision. A letter from petitioners' counsel dated October 25, 2001, which was directed to the Commissioner, reflected that the efforts of the County Superintendent were meeting with success and that the Bergenfield Board was recommending that M.C. be placed in the Teaneck High School Alternative II program offered by the Teaneck School District.

II.

Petitioners are not challenging the validity of the Board's action in expelling M.C. Rather, it is the Board's failure to provide M.C. with an alternative education program after expelling him that is being challenged.

Petitioners' claims are straightforward. They contend that because the Education Clause of the New Jersey Constitution mandates a free public education for all children between the ages of five and eighteen, the Board's failure to provide M.C. with an alternative education program under these circumstances violates the New Jersey Constitution. They further argue that because other school districts in New Jersey

provide their students with alternative education programs, the Bergenfield Board is violating M.C.'s equal protection rights under the New Jersey Constitution. Petitioners maintain that the Board has also violated M.C.'s equal protection rights by paying for educational services for two students it had expelled during their incarceration in juvenile detention centers while not providing such services to M.C. In addition to their constitutional claims, petitioners continue to argue that the Board's actions were arbitrary and capricious because M.C.'s permanent expulsion without alternative education was not grounded in professional evaluations.

Petitioners also seek through this appeal to pursue their claims against the Commissioner and the State Board of Education, whom the ALJ had dismissed from the case. Petitioners claim that because the Commissioner and the State Board have delegated responsibility for effectuating the New Jersey Constitution's mandate for the provision of a thorough and efficient education, they are required to establish through regulation uniform standards for the provision of alternative education. Petitioners contend that the Commissioner and State Board should therefore be reinstated as parties to this matter.

III.

Initially, we recognize that petitioners' claims are largely of constitutional dimension, and we are cognizant that we do not have the jurisdiction to ultimately resolve them. Paterson Redevelopment Agency v. Schulman, 78 N.J. 378 (1979), cert. denied, 444 U.S. 900, 100 S. Ct. 210, 6 L. Ed. 2d 136 (1979); Reed By & Through Reed v. Attorney General, 195 N.J. Super. 172 (App. Div. 1984). However, we are mindful

of our responsibility to address such claims, not only to ensure an adequate record on appeal, Abbott v. Burke, 100 N.J. 265 (1985) (subsequent history omitted), but also to provide our insights on a subject that is within our purview. Board of Educ. of Neptune v. Neptune Tp. Educ. Ass'n, 293 N.J. Super. 1 (App. Div. 1996). As expressed by the Appellate Division:

> Where the broader subject matter of a case is within the purview of an administrative agency's authority, it is valuable to have the insights and policy reflections of that agency, even if the only issue to be decided is one of constitutional dimension, in respect of which the agency is seen to have no particular expertise or authoritative decisional role. In such matter it is appropriate that a case proceed to an agency adjudication…subject, of course, to appellate review without the presumption of correctness that would attend the resolution of less weighty questions.

Id. at 9.

As previously stated, we have concluded from both a legal and educational policy perspective that a child excluded from the regular classroom for disciplinary reasons must be provided with an alternative education program. The student involved in this case is no exception.

As we said in directing interim relief in this matter:

> We conclude without hesitation that M.C. is entitled to emergency relief. Initially, we recognize our broad responsibilities for insuring the effectuation of the constitutional mandate for a thorough and efficient system of free public education "for the instruction of all children in the State between the age of five and eighteen years." New Jersey Constitution, Article VIII, Sec. IV, para. 1. See, e.g., In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 273 (1981); Robinson v. Cahill, 62 N.J. 473, 509 n.9 (1973); Jenkins v. Morris Tp. School Dist., 58 N.J. 483, 494 (1971). It would be an abrogation of our responsibility were we to fail to insure that such instruction is provided to a child who is the subject of litigation before the State Board during the

> pendency of the matter. Furthermore, we find it obvious that a child such as M.C. suffers irreparable harm when he is deprived of an education for even a brief period of time. In fact, given M.C.'s academic record as stipulated by the parties, it is a certainty that he will suffer such harm if his education is disrupted at this point. The nature of the harm that M.C. would suffer were we to deny him relief far outweighs that which the Board may experience as the result of being required to provide him with an education during the pendency of the appeal in this case. In addition, it is clear from an educational policy perspective that the public interest is best served by continuing M.C.'s education during that period.

State Board's Decision of September 5, 2001, slip op. at 5-6.

Consideration of the merits of this case has not changed our view. Rather, further consideration has reinforced our view from both a legal and educational policy perspective that so long as M.C. is excluded from a regular classroom setting, he must be provided with an alternative education program until he either graduates from high school or reaches his nineteenth birthday.

We recognize that the question of whether a student who has been permanently expelled from school but who is not incarcerated is entitled to continue his education in an alternative setting has not been settled. However, the Chancery Division of Superior Court has recently considered the question of whether the State has a constitutional obligation to provide an alternative school program for a student who has been adjudicated delinquent and placed on probation by the Family Part of the Superior Court, Chancery Division, even though the student has been expelled by his local school district. State of New Jersey in the Interest of G.S., 330 N.J. Super. 383 (Ch. Div. 2000).

G.S. involved a student who had participated in making a false bomb threat. As a result, he was charged with making a false public alarm and adjudicated delinquent. He was not incarcerated, but rather placed on probation by the court with conditions that included the requirement that he attend school regularly and obtain a high school diploma. When his local school district expelled him, he sought relief from the court, asserting that the State had a constitutional obligation to provide him further public education.

Stressing that the New Jersey Constitution placed the obligation to provide school instruction on the State and that the Legislature had implemented the constitutional requirement by providing for the public education of every child within the State, the court found it clear that the constitutional obligation imposed on the State extends to juveniles who have been adjudicated delinquent. In support of its conclusion, the court pointed to the fact that juveniles adjudicated delinquent and committed by the court to lock-up facilities continue to receive education. The court also found that the Legislature had recognized a constitutional obligation by mandating provision of continuing education for those juveniles adjudicated delinquent for violation of the "Zero Tolerance for Guns Act." In addition, the court emphasized that the New Jersey Code of Juvenile Justice contemplated that adjudicated delinquents would continue to receive public education until their nineteenth birthday and it empowered the Family Part of Superior Court to enforce the legal obligation due to an adjudicated delinquent, which "would include enforcement of the State's obligation to provide him a free education." G.S., supra, at 394.

In this context, the court stated that it was obvious that "the Legislature recognizes that expulsion of an adjudicated juvenile by his local school board does not sound the death knell for his constitutional right to receive alternative education in another setting, and further, that the Family Part is empowered to order that such alternative education be provided to him." Id. The court therefore ordered that the State provide an alternative education program for G.S. "in order to effectuate its constitutional obligation to furnish him a free public education until he attains his high school diploma or attains his 19th birthday, whichever comes first." Id.

The circumstances of the case now before us are similar to those in G.S. As set forth in the ALJ's initial decision and stipulated by the parties, M.C. was charged as a juvenile with aggravated assault and unlawful possession of weapons on school grounds as a result of the incident for which he was expelled. Initial Decision, slip op. at 10; Stipulation of Facts #15. Like G.S. he was adjudicated a juvenile delinquent at a hearing on the charges against him, pleading guilty to a disorderly persons offense and to a fourth-degree weapons charge. Id. The court suspended a thirty-day sentence in the juvenile detention center and instead sentenced him to probation, the payment of fines and restitution, and completion of the court's Service Learning Program. Id.

The major differences between G.S. and M.C. are that one of the conditions of G.S.'s probation was regular attendance at school and that he invoked the jurisdiction of the Family Part of Superior Court in order to be able to continue his education rather than seeking relief from the Commissioner of Education. We find that such distinctions do not justify denying M.C. the right to continue his education until he either obtains his high school diploma or reaches his nineteenth birthday. In this respect, we fully agree

with the court in G.S. that education is an important part of the rehabilitative process for children who have engaged in conduct such as that involved here. Id. at 364.

Furthermore, we cannot ignore the fact that the Legislature has mandated that alternative education be provided to students who are convicted for possession of firearms on school property or at a school function or for committing a crime while possessing a firearm in those circumstances, N.J.S.A. 18A:37-8, and that we have implemented that mandate through the adoption of regulations. N.J.A.C. 6A:16-8.3. It would be inconsistent with the educational policy embodied in both the legislation and our regulations to deny a child an alternative education program because, as here, the weapon involved in his offense was a box-cutter rather than a gun.

This view is reinforced by the fact that when the Legislature enacted the State Facilities Act of 1979, N.J.S.A. 18A:7B-1 et seq., it expressly insured that children who are incarcerated in State correctional facilities would be provided with a thorough and efficient education. It would be ludicrous to follow an educational policy that recognizes the right to a thorough and efficient education of juveniles who commit offenses serious enough to warrant incarceration while denying such education to those children whose offenses are less serious.

Hence, for the reasons stated herein, we find that the Bergenfield Board must provide M.C. with an alternative education program until he either graduates from high school or reaches his nineteenth birthday.

IV.

We turn now to petitioners' contention that the Commissioner and the State Board should be reinstated as party respondents to this case so that petitioners may pursue their claims against them. Petitioners first argue that the Commissioner and the State Board are proper party respondents because they violated M.C.'s right to a thorough and efficient education, as well as his right to equal educational opportunity and equal protection of the law, by allowing him to be expelled without the provision of an alternative education. Given our decision in this matter, we reject this claim.

Petitioners next argue that the State Board and the Commissioner must be reinstated as party respondents because they have acted arbitrarily and capriciously in failing to promulgate regulations for the provision of alternative education to students such as M.C. on a state-wide basis. We also reject this claim.

In seeking to compel the promulgation of regulations through the agency adjudication that has resulted in the appeal now before us, petitioners have failed to follow the proper course for obtaining the relief they are seeking. Rather, as provided by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., the proper course for seeking the adoption of regulations by an administrative agency is to petition the agency to adopt a new rule according to the procedures prescribed by such agency. N.J.S.A. 52:14B-4(f). See N.J.A.C. 6A:6-4, codifying the procedures to be followed in filing a petition for rule-making with the Department of Education. In the event that a party is dissatisfied with the disposition of his petition or with regulations adopted as a result of such petition, his recourse is to appeal to the Appellate Division. E.g., In re Adoption of N.J.A.C. 9A:10-7.8(b), 327 N.J. Super. 149 (App. Div. 2000). See In re 1999-2000

Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382 (App. Div. 2002). Since the administrative adjudication through which petitioners are seeking resolution of their contested case cannot afford them the relief they seek with respect to the promulgation of regulations, we reject their contention that the Commissioner and State Board must be reinstated as parties to the case.

CONCLUSION

We have concluded from both a legal and educational policy perspective that a student who is expelled from school must be provided with an alternative education program until he either graduates from high school or reaches his nineteenth birthday, whichever comes first. In doing so, we stress the importance of providing educational services to students who present serious disciplinary problems. Although it may be more challenging to provide such students with effective educational services, we do not believe that it is sound educational policy to turn our back on students just because it may be difficult to educate them. To the contrary, it is all the more imperative that we fulfill our responsibilities to these children both for their sake and for society's.

Edward Taylor abstained.

Attorney exceptions are noted.

July 2, 2002

Date of mailing _____