40-02
(Note: A party's request that this matter be sealed was withdrawn by letter dated March 14, 2002.)

A.M. AND S.M., on behalf of minor child, M.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 4, 2002

OAL DKT. NO. EDU 7831-01
AGENCY DKT. NO. 365-9/01

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The record, Initial Decision issued by the Office of Administrative Law, petitioners' exceptions thereto and the Board's reply exceptions have been reviewed. To the extent petitioners' exceptions reiterate those arguments already advanced before and considered by the Administrative Law Judge (ALJ), they are only briefly summarized herein.

Petitioners contend, *inter alia,* that:

> The ALJ entirely failed to address the question whether, in view of the uncontradicted evidence that [M.M.] was neither malicious nor dangerous, the isolated incidents occurring in the middle of the previous school year -- for which [he] had already been severely punished -- could form the basis for his expulsion in the current school year, when no claim could possibly be made that [M.M.'s] past misconduct required "immediate definitive action" (*see* Board Policy #5114, *supra* at 13n.8). Nevertheless, [the ALJ] explicitly "found" that "there is a reasonable concern that [M.M.] poses a danger to himself, to others and to school property," thereby contradicting the unanimous view of the mental health care professionals and the testimony of [M.M.'s] teachers, neighbors and family. [The ALJ] also found that the three alternative placements proposed by the Board were appropriate, explicitly

> relying on the certifications of Messrs. Keenoy and Anunson, neither of whom had provided any evidence to the Board, neither of whom were subjected to cross-examination before the Board or before the ALJ. (Petitioners' Exceptions at 23)

Petitioners further argue that the Board seriously and repeatedly violated M.M.'s constitutional rights to a full and fair hearing by refusing to allow them the opportunity to confront and cross-examine witnesses the Board extensively relied upon in reaching its decision with respect to M.M.'s expulsion (Superintendent Grady, the Board's Attorney and A.A.), and by relying on hearsay evidence obtained at proceedings to which M.M. was not privy, and by prejudging his case long before M.M. actually appeared before the Board. (*Id*. at 24-29)

Petitioners next reiterate their contention that the Board's action in expelling their son was arbitrary, capricious and unreasonable, arguing, *inter alia,* that:

> The Board ordered [M.M.'s] expulsion despite the fact that the threshold requirements [of the Board's policy] for expulsion, incorrigibility or a threat of danger requiring immediate action, were not satisfied in this case. Moreover, in light of the lengthy punishment that [he] had already endured, which included suspension from fully one-half of the 8th grade year, and the undisputed, overwhelming evidence that his past misconduct represented an isolated aberration and that he posed no danger of any kind, expulsion was an unreasonably and unnecessarily harsh penalty. Finally, the alternative placements specified in the Board's expulsion order are entirely inadequate. (*Id*. at 29)

Respondent's reply exceptions strenuously object to petitioners' allegation that M.M. was not afforded due process throughout the disciplinary proceedings, averring, *inter alia,* that he was afforded: (1) a preliminary hearing after being taken into custody, which he declined; (2) a full hearing before the Board; and (3) the opportunity to challenge the Board's decision pursuant to state regulation. (Board's Reply Exceptions at 4) The Board further avers that M.M. had a full and fair hearing before the Board, which complied with all due process requirements; *i.e.,* M.M. and his parents had two attorneys at the hearing representing their interests, petitioners were provided written notice of the charges, the list of witnesses, and the

factual record that would be provided to the Board. (*Id*. at 6) Petitioners also had the opportunity to provide the Board, prior to the hearing, a brief prepared by their counsel and several psychological reports on M.M. (*Id*. at 7) The Board further characterizes as "simply unfounded" petitioners' allegation that they were unable to cross-examine Mr. Grady, the superintendent, arguing, *inter alia,* that:

> A more thorough review of the hearing transcript, rather than extracted portions, undeniably reveal petitioners' mischaracterization of what occurred at the hearing.*** Superintendent Grady appeared as a witness before the Board. (Pa. 9) Immediately thereafter, petitioners' counsel began to question Mr. Grady concerning his view as to whether the conditions warranting expulsion were satisfied in this case. (Ra. 9) Although the Board's attorney interrupted the questioning here, it was merely in the interest to avoid argumentative questions and direct petitioners' counsel to ask more specific questions of Mr. Grady.
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> Petitioners have characterized this exchange as a complete prohibition to *all* cross-examination throughout the entire proceeding. The Board vehemently disputes this characterization. The Board's counsel's statement of "I thought you were going to ask him specific…questions" demonstrates that petitioners maintained the right to cross-examination throughout the proceeding. It is also important to note that M.M.'s attorney had already cross-examined Superintendent Grady during M.M.'s criminal proceedings in Superior Court (Pa. 110a-153a). Petitioners were represented by two highly competent attorneys who were well aware of the right to cross-examine. M.M.'s attorneys could have called any witness they wanted, and could have asked any question they wanted. They opted not to. The Board took every measure possible to ensure that M.M. was afforded sufficient due process. (emphasis in text) (Reply Exceptions at 7-8)

The Board next argues that petitioners' allegation that M.M. was deprived of his right to an impartial hearing is completely without evidentiary support, maintaining, *inter alia,* that there is not a shred of evidence that the Board held some bias or animus toward M.M., or that any member of the Board held a personal vendetta against him. (*Id*. at 9-11) The Board

further stresses that M.M. admitted to making and planting explosive devices at the middle school and breaking into the school with a flying explosive taped to his leg; therefore, the purpose of the hearing was not to decide the fate of a student professing innocence, but rather to determine an appropriate penalty.

Upon comprehensive review of the full record in this matter, the Commissioner agrees with and adopts as his own the recommendation of the ALJ to dismiss the Petition of Appeal for the reasons set forth in the Initial Decision. As correctly noted by the ALJ on page 7 of the Initial Decision, a pupil may be suspended or expelled for good cause shown in accordance with *N.J.S.A.* 18A:37-2. Furthermore, an action of a local board of education which is within its discretionary powers may not be upset unless it is found to be patently arbitrary, without rational basis or induced by improper motives. *Kopera, supra.* This standard imposes a heavy burden on those who challenge actions of boards of education. As the Courts have held:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (internal citations omitted) (*Bayshore Sewerage Co. v. Dept. of Envt. Protection*, 122 *N.J. Super*. 184, 199-200 (Ch. Div. 1973), aff'd 131 *N.J. Super*. 37 (App. Div. 1974))

In applying this standard to the instant matter, the Commissioner cannot substitute his judgment for that of the Livingston Board of Education, even if he believed an erroneous conclusion had been reached by the Board, which he does not. The record in this matter clearly establishes that the Board did not take willful or unreasoning action, without consideration and in disregard of the circumstances. It unequivocally establishes that M.M., on four separate occasions, brought explosive devices onto school property, which M.M. admitted both in New

Jersey Superior Court and at the Board of Education hearing. (Initial Decision at 3-4) On three occasions, the devices detonated. (*Id*. at 3) As correctly found by the ALJ, although no one was hurt, the potential for injury to persons or damage to property was and is evident. On the fourth occasion, M.M. broke into a school with the intent of "pranking the school" (Transcript of September 10, 2001 Hearing Before the Board, at 87) and "minor vandalism" (*id.* at 92), such as gluing books and doors shut, a fact which M.M. testified to at the Board hearing but which he neglected to admit before the Superior Court Judge, when stating that he merely intended to walk around the building (Superior Court Hearing, April 3, 2001 at 24a)[1]

The Commissioner further finds meritless petitioners' arguments of violation of M.M.'s due process rights, because the record unequivocally establishes that M.M. and his father had more than ample opportunity to be heard by the Livingston Board of Education before the Board acted on the superintendent's recommendation to expel him. Likewise, the Commissioner finds meritless petitioners' arguments that M.M.'s circumstances do not meet the standards of the Board's expulsion policy #5114. The record firmly establishes that M.M. attempted to cause damage to property on school premises and that he possessed and used unsafe and illegal articles which presented a clear possibility of danger to others. Accepting petitioners' characterization that M.M. was not a "repeat offender," and, thus, viewing the series of four proximate incidents as one single event, the second prong of the Board's policy has certainly been met, because the *nature of M.M.'s actions*, under the circumstances, presented a clear possibility of danger.[2]

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[1] The transcript of the proceedings before the Board is contained in Respondent's Appendix on Emergent Application. The transcript of the Superior Court hearing is contained in Petitioners' Appendix on Motion for Emergent Relief.

[2] Policy #5114 states in pertinent part that " the Board will consider expulsion only if:

A. The chief school administrator with his/her staff have exhausted all means of bringing about a correction of repeated misconduct; or

B. *The nature of a single act* presents such a clear possibility of danger to others that immediate definitive action is indicated." (emphasis supplied)

Finally, the fact that M.M. may have been subject to harsh punishment as a result of his 40 plus days of incarceration (*see e.g., id.* at 64-73) and his subsequent intensive court-ordered (*id.* 73-75) supervision does not mean that the Board's action to expel him was arbitrary, capricious, unreasonable or in violation of the Board's expulsion policy, particularly in light of the fact that the expulsion order permits him to apply for readmission to Livingston High School in May 2002 and he has been and will continue to be afforded educational programming during the period of expulsion.

Accordingly, the Petition of Appeal is dismissed for the reasons set forth in the Initial Decision and expanded upon herein.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: February 4, 2002

Date of Mailing: February 4, 2002

[3] 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.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.