219-01

P.H. AND P.H., on behalf of minor child, M.C.,	:	
	:	
PETITIONERS,		
	:	COMMISSIONER OF EDUCATION
V.		
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

High school student, M.C., who had a record of prior school suspensions for offenses, slashed another student's coat with a box-cutter razor. Police verified the existence of weapons in M.C.'s possession and charged him as a juvenile with aggravated assault. M.C. pled guilty and was placed on probation. The Board suspended M.C. and eventually expelled him from the Bergenfield public school system. Petitioning parents sought an order directing respondents to assess M.C.'s alternative education needs and directing respondents to provide an alternative education program by the beginning of the 2000-2001 academic year. On application for emergent relief, the Commissioner directed the Board to immediately place M.C. on a program of home instruction until this matter was fully litigated and decided.

Following four days of hearing, the ALJ concluded, *inter alia*, that 1) petitioners' appeal for a Declaratory Ruling that expulsion of M.C. violated M.C.'s constitutional right to a thorough and efficient education was denied for lack of jurisdiction; 2) petitioners' appeal for a Declaratory Ruling that denial of an alternative education program for M.C. violated M.C.'s constitutional right to a thorough and efficient education was denied for lack of jurisdiction; 3) the District's expulsion of M.C. was arbitrary, capricious and unreasonable; 4) the District's denial of an alternative education program for M.C. was not arbitrary, capricious and unreasonable; 5) petitioners' appeal for a Declaratory Ruling that expulsion of M.C. violated his constitutional right to equal protection was dismissed for lack of jurisdiction; 6) petitioners' appeal for an order setting aside the expulsion and requiring the Board to immediately assess M.C.'s alternative education needs and to identify an appropriate alternative education program that meets the Core Curriculum Content Standards was denied; 7) all evidence of M.C.'s expulsion be expunged from his school records; and that 8) the District should conduct an evaluation of M.C. consistent with the Individuals with Disabilities Education Act (IDEA), but that following evaluation, if it is determined that M.C. was not a child with a disability, the expulsion was not arbitrary, capricious and unreasonable.

The Commissioner affirmed the ALJ, with modification. The Commissioner concurred that the constitutional question of expulsion without provision of (post-expulsion) alternative education is appropriately addressed by the Courts. The Commissioner also concurred that the record before him did not support a conclusion that the Board acted unreasonably by failing to provide M.C. with an alternative education program in lieu of expulsion. However, the ALJ's recommended Orders with respect to evaluation of M.C. to determine his eligibility for special education services were set aside for lack of jurisdiction, and the Commissioner held, absent a determination in the appropriate forum that M.C. should have been evaluated and found eligible for special education services, that the District's expulsion of M.C. was not arbitrary, capricious or unreasonable, and thus not to be expunged from his record.
JULY 16, 2001

OAL DKT. NO. EDU 07381
AGENCY DKT. NO. 222-6/00

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PETITIONERS,	:	COMMISSIONER OF EDUCATION
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RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both parties submitted exception and reply arguments.

BOARD'S EXCEPTIONS/PETITIONERS' REPLIES

The Board initially contends that the Commissioner should disregard the additional requested relief set forth at pages 6 through 8 of the Initial Decision, in that these requests were never pled and petitioners never sought to amend their pleadings pursuant to *N.J.A.C.* 1:1-6.2. Rather, the relief sought by petitioners should, argues the Board, be limited to that which is pled in the Verified Petition of Appeal. Therein, petitioners do not seek to have M.C. evaluated by a psychologist but, rather, to assess his alternative education needs so as to identify an appropriate alternative education program. (Board's Exceptions at 2) The Board points out that the petition does not seek M.C.'s placement in a public school setting. Although the Board acknowledges that the rules of Superior Court allow judgments to include relief to which a party is entitled, even if not pled, such relief is granted only where the parties have an adequate opportunity to be heard as to the relief granted. Here, the Board contends:

> Petitioner[s were] given the opportunity to pursue issues regarding special education and specifically rejected that opportunity. Certainly, one opportunity available to the Petitioner[s] was a due process hearing seeking to have M.C. evaluated to determine whether he was eligible for special education and related services. That evaluation could have included a psychological evaluation. However, the Petitioner[s] chose not to pursue that avenue, and specifically rejected this avenue when questioned by the court. The Board could not have foreseen that the court *sua sponte* would have raised the issue previously rejected by the Petitioner[s]. If special education were an issue in this case, the Board would have put on different witnesses and addressed those issues. As it stands, the Board was not given that opportunity. (*Id.* at 2-3)

In reply, petitioners assert that, indeed, they put the Board on notice that they were seeking M.C.'s return to a traditional public school setting as an alternative form of relief. (Petitioners' Reply at 2) Specifically, in her opening statement at the plenary hearing, petitioners' counsel so requested. Although the Board emphatically objected to this alternative request being raised at the start of the hearing, the Administrative Law Judge (ALJ) overruled the objection, stating, *inter alia*, that the Board would be permitted more time, if necessary, for additional investigation so as to allow it to meet this claim. (*Ibid*., *citing* to Tr. 1/30/01 at 18) Moreover, petitioners reason, that the OAL rules for amending pleadings are liberal, and since the Board was clearly put on notice of their alternative relief, yet did not make any requests for the additional time offered to it by the ALJ, it cannot claim to be prejudiced by this request. (*Id.* at 3) Moreover, petitioners argue that while they did not raise special education claims in this matter, they never waived their rights under the Individuals with Disabilities Education Act (IDEA). To the extent local boards have an affirmative "child find" obligation imposed by IDEA, the ALJ's identification of M.C. as potentially eligible for special education services obligates the Board to conduct such an evaluation. Further, petitioners add that since M.C. is still of an age eligible for special education services and is "still within the time period in which

he is subjected to expulsion" (*id*. at 4), the ALJ's recommendation for his evaluation constitutes a "request" under IDEA and, therefore:

> P.H. specifically authorizes and requests the Board to conduct a full and individual evaluation of M.C. to determine his eligibility for special education and related services, and asks that the Commissioner direct the Board to conduct such an evaluation as required by IDEA. Based on the request of the ALJ and P.H. for M.C.'s evaluation while he is subjected to expulsion, the Board and the Commissioner have no discretion but to provide such an evaluation. (*Id*. at 5)

The Board next reiterates its position that M.C.'s intent with respect to the slashing incident is irrelevant; "[t]he fact remains that N.S. could have been gravely injured as a result of M.C.'s actions." (Board's Exceptions at 3) Further, since the ALJ found that the record did not support the conclusion that M.C. did not intend to injure N.S., "whether Dr. Galish recommended expulsion without ascertaining M.C.'s intent is not relevant to the ultimate issue of discipline." (*Id.* at 5) Moreover, although the ALJ found that P-3 and P-9 were the only documents introduced at M.C.'s hearing prior to expulsion, the Board clarifies that the testimony reflects that these two documents were the only reports of the incident prepared for the hearing, but were not the only two documents. (*Id*.) Additionally, the Board underscores that there is no legal requirement that district guidance counselors, social workers or school psychologists testify at a board hearing. Neither are local districts required to perform child study team (CST) evaluations prior to expulsion of a noneducationally disabled pupil. (*Ibid.*)

To this, petitioners respond that although M.C.'s intent or motivation is immaterial to their claim that he is constitutionally entitled to alternative education after expulsion, they nevertheless maintain that the Board's knowledge of M.C.'s intent or motivation *is* relevant to their claim that the Board acted arbitrarily and capriciously. (Petitioners' Reply at 6) In this connection, petitioners contend that the Board's failure to solicit testimony or reports

from any district guidance counselor, social worker or school psychologist prior to resolving to permanently expel M.C. constitutes a substantive deficiency. (*Id*. at 8)

The Board next asserts that the ALJ placed undue weight on Dr. Greene's testimony, in that such testimony was "generalized and not at all specific to M.C." (Board's Exceptions at 7) Moreover, the "best practices" that Dr. Greene addressed in testimony, have not, according to the Board, been adopted by the Commissioner, State Board or New Jersey Courts. The Board underscores that it need only act in a manner which is not arbitrary or capricious. (*Id*. at 8)

In reply, petitioners urge that Dr. Greene's testimony regarding the ill effects of expulsion be credited, inasmuch as the Board has introduced no testimony or documentary evidence to support the proposition that expulsion has any deterrent effect on the behavior of other students. (Petitioners' Reply at 10) Petitioners reason that a failure to employ recognized "best practices" is arbitrary, capricious and unreasonable when that failure results in a student's permanent expulsion. (*Id*. at 11)

The Board's exceptions further assert that the ALJ ascribed to it a position which is not supported by the within record. Specifically, the ALJ concludes "that the Board implicitly argued that M.C.'s father's request to put off scheduling a Pupil Assistance Committee ("PAC") meeting until after mid-term exams was a means of circumventing District responsibility and washing the Board's hands of M.C." (Board's Exceptions at 8) However, the Board argues that the parties herein stipulated to the existence of a referral letter (J-2), as well as M.C.'s father's request to postpone action until after his exams. The PAC meeting did not take place because M.C. was suspended during the course of the mid-term exam period. (*Ibid*.) Moreover, the Board clarifies that the reason for the PAC referral was based on M.C.'s three failures for the

first marking period, and had nothing to do with his behavior in school or his potential for being classified. (*Id.* at 8-9) To the extent the ALJ concludes that the Board had an obligation to evaluate M.C. for special education services before it expelled him simply because he had been referred to the PAC for experiencing academic difficulties, the Board asserts that the ALJ's position is not supported by the law. (*Id.* at 9) Here, the Board underscores that the PAC is designed for regular education students who have not been determined eligible for special education services. While the Board acknowledges there may be instances where a PAC referral precedes a student's ultimate referral to the CST pursuant to a district's "child find" obligations, "there is no provision *** that suggests that a PAC referral requires a school district to make a determination of eligibility for special education services where there is a pending disciplinary hearing." (*Id*. at 9-10) Further, the Board argues:

> Under the IDEA, a regular education student facing disciplinary action is not entitled to the protections of the special education laws if the school district did not have knowledge that the child was a child with a disability. (citations omitted) *** (*Id*. at 11)
>
> In this case, there is no evidence to suggest that the Board had "knowledge" that M.C. may be a student with a disability un accordance with 34 C.F.R. § 300.527. Accordingly, M.C. was appropriately subjected to the same disciplinary measures applied to students without disabilities who engage in behaviors in violation of Board rules of conduct. *** (*Id*. at 13)

To buttress its claim to a lack of knowledge, the Board indicates that M.C. was not referred to the PAC for violent or disruptive behavior or a suspected disability. Additionally, pursuant to its "child find" obligations, M.C. had already been referred for an evaluation by the Board's CST two years before his expulsion and determined not eligible for special education services. Finally, the Board notes that M.C.'s parents never disputed or challenged the CST's determination that M.C. was not eligible for special education, never requested a due process

hearing, or additional evaluations. (*Id*. at 14) Thus, the Board concludes that it has been "profoundly prejudiced" by its lack of "opportunity to present testimony and documentation at the hearing to address this post-hearing issue." (*Id*. at 15)

Petitioners view the Board's argument in this regard as a concession that "it took no action whatsoever in response to M.C.'s increasingly inappropriate behavior in school, which culminated in his expulsion." (Petitioners' Reply at 11) Petitioners contend that the stipulated facts demonstrate that M.C. had a "troubled record" both at Bergenfield High School and Bergenfield Middle School; yet, M.C. did not receive any physiological counseling and his counselor did not discuss behavioral issues with him or recommend that his parents get counseling for him. Therefore, petitioners maintain that the Board's imposition of the harsh remedy of expulsion before attempting less drastic interventions, as well as its failure to refer M.C. to an alternative education program before he exhibited behavior which gave rise to his expulsion is arbitrary, capricious and unreasonable. (*Id*. at 12)

PETITIONERS' EXCEPTIONS/BOARD'S REPLIES

Petitioners take issue with the ALJ's finding that the Department of Education's publication, *A Guide and Application for the Operation and Approval of High School Alternative Education Programs (November 1999)* (*Guide*), '"does not …mandate the creation of alternative education programs by local districts in New Jersey ."' (Petitioners' Exceptions at 3, citing to Initial Decision at 30) To the contrary, petitioners contend that Department policy supports and recommends the creation and use of alternative education programs for local districts. (*Id*.)

The Board counters that the *Guide* discusses the merits of alternative educational programming and provides necessary guidance for a local board's application for approval of

such a program, but does not suggest that all local districts in New Jersey create alternative education programs. (Board's Reply at 2)

Petitioners next except to the "ALJ's oversight in not making an explicit finding that Dr. Greene is an expert in the area of the causes and prevention of school and youth violence." (Petitioners' Exceptions at 6) They also object to the ALJ's rejection of Dr. Greene's opinion that: (1) M.C. poses no danger to his school community and to himself; (2) placement in alternative education would be appropriate for M.C.; and (3) M.C. most likely acted out of feelings of anger, resentment, inadequacy or perceived provocation. (*Id.* at 7-8)

To this, the Board counters that, indeed, the ALJ specifically noted that Dr. Greene was permitted to testify and as an expert in the causes and prevention of school violence. (Board's Reply at 3) Furthermore, since Dr. Greene admitted that he did not speak to M.C. until he had a 10-minute social conversation with him prior to his testimony, and that he never reviewed any documents about the incident in question, the ALJ properly credited his supposed "expert" opinions. (*Ibid*.)

Petitioners also take exception to the ALJ's failure to rule on any of their constitutional claims. Contrary to the ALJ's finding, petitioners maintain that the Commissioner has jurisdiction to decide these issues. Petitioners argue that the ALJ "is simply incorrect" in describing their constitutional claims "as either 'an attack on the facial validity of [the Board's disciplinary] policy or as some mandamus-like demand for policy making.'" (Petitioners' Exceptions at 10, citing to Initial Decision at 33) Petitioners herein clarify that their challenge is "clearly on the constitutionality of the Board's action *as applied* to M.C., [which] is inextricably linked to an examination of the legality of the Board's expulsion of M.C. without alternative education." (emphasis in text) (*Id*. at 10)

The Board, however, contends that petitioners' argument is a fallacy, in that their constitutional attacks are *not* unique to M.C. and could be applied to any student in New Jersey who is expelled without alternative education. (Board's Reply at 4) The Board reasons that petitioners have attacked the constitutionality of various State statutes, and the administrative courts are not the appropriate forum for determining the constitutionality of these State statutes.

Petitioners additionally claim that the ALJ applied the wrong standard of review for determining M.C.'s entitlement to an education. That is, petitioners assert that the "arbitrary, capricious and unreasonable" standard is not applicable herein, since a student's fundamental rights are at issue:

> Because a fundamental right is at issue, every instance of long-term suspension and expulsion must be examined under a fundamental rights analysis, requiring the weighing of the governmental and individual interests involved and a determination of the narrowest means to achieve the governmental interest.*** (Petitioners' Exceptions at 11)

The Board, however, argues that the arbitrary, capricious and unreasonable standard is routinely applied to expulsion cases, and case law holds that there is no need to explore constitutional issues when the *Kopera, supra,* standards are met. (Board's Reply at 5)

Petitioners next take exception to the ALJ's Interlocutory Order, dated January 5, 2001, (dismissing the Commissioner of Education and the State Board of Education as respondents) and to the ALJ's Interlocutory Order, dated January 9, 2001, (denying petitioners' request that he take judicial notice of a factual finding in *Abbott v. Burke*, 153 *N.J.* 480 (1998)), seeking the reversal of the respective Orders. (Petitioners' Exceptions at 11-13)

In reply, the Board argues that petitioners fail to note that both Orders were subject to interlocutory appeal, and both Orders were affirmed by the Commissioner on January 22, 2001 and January 26, 2001, respectively. Thus, the Board asserts, petitioners are

not entitled to "a second bite out of the apple" by appealing the Commissioner's decisions at this time. (Board's Reply at 6) The aforementioned Orders by the Commissioner are considered final orders as to separable issues. Since an appeal to the State Board of Education of a final order by the Commissioner must be made within 30 days for the filing date of the decision, the Board reasons that petitioners are clearly out of time to challenge these Orders. (*Id*.)

Petitioners further challenge the ALJ's conclusion that the Board's failure to provide M.C. with alternative education following his expulsion was not arbitrary, capricious and unreasonable. In support of their claim, they cite to the Commissioner's decisions in *C.S. v. Bd. of Education of the Tp. of Piscataway*, 97 *N.J.A.R.*2d (EDU) 573, *aff'd* State Board April 11, 1998, and *M.G. v. Bd. of Educ. of Twp. of Washington*, Commissioner Decision November 6, 2000. (Petitioners' Exceptions at 14) That the ALJ concluded the Board had a rational basis for denying post-expulsion alternative education to M.C. was, according to petitioners, erroneous:

> The Board does not need to establish its own alternative education program in order to provide alternative education to M.C.; it could enroll him in the program of another county or local school district. The Board produced no evidence that it would be very expensive to enroll M.C. in another district's program ***." (*Id.* at 14-15)

Similarly, petitioners object to the ALJ's conclusion that the Board's expulsion is not arbitrary, capricious and unreasonable if, upon evaluation, M.C. is determined not to be a child with a disability. (Petitioners' Exceptions at 15) Here, petitioners reason that the record establishes that, irrespective of the results of the evaluation, the Board's failure to assess M.C. and offer less drastic interventions renders its action arbitrary, capricious and unreasonable.

The Board counters that "[p]etitioners have lost sight of the very core of this dispute: there exists no legal obligation imposed upon local school districts in New Jersey to

afford students expelled in accordance with law the opportunity to attend an alternative education program." (Board's Reply at 7) Neither do the cases cited by petitioners create any obligation to provide such services. (*Id.* at 8)

As to the ALJ's Order that a determination be made whether M.C. was a child with a disability prior to January 26, 2001, petitioners argue that if M.C. was a child with a disability before that date, then he was entitled to the protections of IDEA which preclude expulsion for behavior related to a disability and which further require that, if a student is expelled for behavior which is not a manifestation of his disability, the student must still receive a free appropriate education. (Petitioners' Exceptions at 17) Petitioners add that "if M.C. is determined to be a child with a disability during any time that he is subject to disciplinary measures by the Board, such as during his period of expulsion" he must receive special education and related services under IDEA. (*Ibid*.)

The Board finds petitioners' challenge in this regard to be disingenuous at best. Where petitioners made it clear that this case did not concern an alleged denial of special education services or treatment inconsistent with IDEA, and the Board attests that petitioners' counsel specifically disclaimed any allegations of entitlement to special education services on behalf of M.C., they should not now be permitted to argue in favor of the very IDEA protections they rejected. (Board's Reply at 8-9)

Finally, as to the ALJ's Order that, pending the evaluations for special education, the Board must continue to provide M.C. with home instruction consistent with the Commissioner's Decision on Motion of September 15, 2000, petitioners argue that the Order is inconsistent with the ALJ's finding that home instruction is not an adequate substitute for placement in an alternative education program. (Petitioners' Exceptions at 17-18; citing to Initial

Decision at 27) Petitioners maintain that M.C.'s home instruction should include the areas required by New Jersey's Core Curriculum Content Standards.

The Board points out, in this connection, that M.C. is receiving instruction in English, Math, Science, and History, as well as Basic Skills instruction in English and Math, and neither the Commissioner's September 15, 2000 Order nor current statute, regulation or case law require more than that which is provided; similarly, compliance with the Core Curriculum Content Standards is not required. (Board's Reply at 9-10)

The balance of petitioners "exceptions" merely identify where the ALJ's findings were not as comprehensive as petitioners would like, but do not, in most instances, challenge those findings made by the ALJ as erroneous and/or not supported by the record in this matter.

COMMISSIONER'S DETERMINATION

Upon careful and independent review of the record in this matter, which included transcripts of the hearing conducted at the OAL on January 30, 2001, January 31, 2001, February 14, 2001 and March 15, 2001, the Commissioner determines to adopt the Initial Decision, with modification. The essential factual findings issued by the ALJ, the Commissioner notes are well-grounded in the record before him and, therefore, except as specifically noted herein, those findings are affirmed. In so affirming, the Commissioner accepts the ALJ's credibility determinations, finding that he carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit in reaching his findings of fact. As the finder of fact, the ALJ had the greatest opportunity to observe the demeanor of the witnesses, and judge their credibility. *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.*2d (EDU) 549, 550, *citing In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super*. 478, 485 (App. Div.), *certif. denied*, 121 N.J. 615 (1989). (*See, also, Whasun Lee v. Board of Education*

of the Township of Holmdel, New Jersey Appellate Division August 7, 2000, Docket No. A-5978-98T2 , slip. op. 14.)[1]

Initially, to the extent petitioners challenge the constitutionality of respondent's policy of expulsion without the provision of (post-expulsion) alternative education, as the ALJ correctly observes, neither statute nor regulation "explicitly address[es] the provision of an alternative education program *following expulsion*." (emphasis added) (Initial Decision at 32) Indeed, the Board's policy appears to be grounded in the current statutory scheme. Thus, the Commissioner concurs with the ALJ that this issue of constitutional dimension is more appropriately addressed by the Courts.

In addition to their constitutional claims, petitioners contend that the Board's failure to provide M.C. with an alternative education *following* his permanent expulsion was arbitrary, capricious and unreasonable.[2] In support of this position, petitioners cite to *C.S., supra,* and *M.G., supra.* (Petitioners' Exceptions at 14) However, the Commissioner finds that since neither case addressed the issue of *post*-expulsion alternative education, petitioners' reliance on these cases is misplaced. Moreover, to the extent petitioners contend that the Board improperly failed to provide M.C. with an alternative education program *in lieu of,* or *prior to,* reaching the ultimate sanction of expulsion, the Commissioner cannot determine that the Board acted unreasonably where the ALJ found, and the record presents no basis to challenge, that:

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[1] The Commissioner herein notes that although he recognizes Dr. Greene's testimony that experts in the field of school and youth violence have embraced "best practices" for handling incidents involving the possession and use of weapons in school (Initial Decision at 27), the acknowledgment of such testimony should not be read as diminishing the significance of the State Board of Education's recent adoption of School Safety regulations, *N.J.A.C.* 6A:16-5.

[2] Curiously, although the Petition of Appeal seeks, *inter alia*, a declaration that the Board's expulsion of M.C. was arbitrary, capricious and unreasonable (Initial Decision at 2), petitioners' exception arguments find such standard to be inappropriate. (Petitioners' Exceptions at 11) Notwithstanding this assertion, the Commissioner finds that the ALJ, indeed, applied the correct standard in reviewing this expulsion matter. *See, V.A., on behalf of minor child, K.M.A. v. Board of Education of the Borough of Collingswood, Camden County*, State Board of Education July 5, 2000.

> Dr. Galish did not think an alternative education program was appropriate for an offense as egregious [as] having brought five weapons to school and using one of them to slash another student. (Initial Decision at 26) .[3]

Finally, the Commissioner declines to adopt the ALJ's conclusion that the Board had sufficient basis to believe that M.C. may have been a student with a disability at the time of the incident underlying his expulsion so as to oblige it to conduct a child study team evaluation of M.C. prior to determining to expel him. Rather, the Commissioner finds that he has no jurisdiction to reach such a conclusion, and holds that any allegation by petitioners that M.C. should have been evaluated to determine his eligibility for special education services and the protections of the IDEA must be pursued in a forum of appropriate jurisdiction. That such allegations were not previously or concurrently made when the instant matter was filed does not preclude petitioners from pursuing them now.[4]

Therefore, the Commissioner concludes that, under these circumstances, he has no cause to substitute his judgment for that of the local Board. Based on the compelling facts presented to the Board in this matter,[5] and noting the weight ascribed by the ALJ to the testimony of Dr. Galish, who affirmed that he did not automatically consider expulsion when he learned of the incident herein, but considered discipline ranging from suspension for longer than 10 days to expulsion (Initial Decision at 19, 25), and further noting there are no surviving claims

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[3] Note that recently adopted regulations by the State Board of Education include a provision for mandatory student placement in an alternative education program, under certain circumstances. *N.J.A.C.* 6A:16-8.3 The code specifically provides for such mandatory placement where "a student [is] removed from general education for an assault with weapons offense, pursuant to N.J.A.C. 6A:16-5.6." *N.J.A.C.* 6A:16-8.3(a)2; *see, also, N.J.A.C*. 6A:16-5.6(d). The code further provides that if such an alternative education program is not available, "the student shall be provided instruction at home or in another suitable facility until placement is available, pursuant to N.J.A.C. 6A:16-9." *N.J.A.C.* 6A:16-8.3(b); *see, also, N.J.A.C.* 6A:16-5.6(d)1.

[4] The Commissioner notes that allegations of this type were neither made in the initial pleadings nor raised before the ALJ until the time of the post-hearing submission. (Initial Decision at 6)

[5] With respect to the evidence before the Board at the time of M.C's expulsion hearing, the Commissioner accepts the Board's clarification, noted *supra,* that the record herein reflects that P-3 and P-9 were the only two incident reports relied upon by the Board in making its decision, Tr. 3/15/01 at 71, 72, but the record does not substantiate that these were the only two documents reviewed by the Board at the hearing.

of due process violations (Initial Decision at 5), and assuming M.C. is not subsequently found, upon appeal to an appropriate forum, to have required evaluation and that any required evaluation, once conducted, does not conclude that M.C. is eligible for special education services as to invoke the protections of the IDEA, the Commissioner hereby modifies the Orders set forth at page 41 of the Initial Decision and **DENIES** petitioners' appeal for a ruling that the District's expulsion of M.C. was arbitrary, capricious or unreasonable and, further **DENIES** petitioners' appeal for an Order expunging all evidence of M.C.'s expulsion from his school records. (*Id*.) Finally, the ALJ's recommended Orders with respect to an evaluation of M.C. to determine his eligibility for special education services are hereby set aside for lack of jurisdiction.

Accordingly, the Initial Decision of the ALJ is adopted in part, and modified in part, as set forth herein.[6] The Petition of Appeal is dismissed.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: July 16, 2001

Date of Mailing: July 16, 2001

[6] The decision herein renders moot any discussion regarding the efficacy of either the Board's particular program of home instruction, or home instruction in general, vis-à-vis a program of alternative education. Consequently, the Commissioner does not herein reach the ALJ's findings and conclusions relative thereto, except to note that such programs are governed by *N.J.A.C.* 6A:16-9 for general education students

[7] 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.