EDU #7831-01
C # 40-02S
SB # 12-02

A.M. and S.M., on behalf of minor child, M.M.,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decision on motion by the Commissioner of Education, October 18, 2001

Decided by the Commissioner of Education, February 4, 2002

For the Petitioners-Appellants, David B. Rubin, Esq. and Joseph D. Pope, Esq., of Counsel

For the Respondent-Respondent, Riker, Danzig, Scherer, Highland & Perretti (Lance J. Kalik, Esq., of Counsel)

This matter is before us pursuant to an application for emergent relief filed on behalf of M.M., a middle school student who was expelled by the Livingston Board of Education on the basis of four incidents involving homemade explosive devices. Petitioners challenged M.M.'s expulsion by filing a petition of appeal with the Commissioner of Education, which was accompanied by an application for emergent relief. The matter was then transmitted to the Office of Administrative Law for hearing.

On October 4, 2001, the Administrative Law Judge ("ALJ") denied petitioners' motion for emergent relief, and, on October 18, 2001, the Commissioner adopted that determination. The matter then proceeded for consideration of the merits. At that point, the parties agreed that the merits would be decided on an expedited basis relying on the record developed in regard to the motion for emergent relief and certain additional exhibits.

On December 13, 2001, the ALJ issued his initial decision as to whether the Livingston Board had acted improperly in expelling M.M. Based on his findings with respect to the four incidents involving the homemade explosive devices, the ALJ concluded that the Board had not acted improperly in expelling M.M. with the provision that he could apply in May 2002 for readmission in the 2002-03 school year. In so concluding, the ALJ found that any of the three alterative education programs offered by the Board could provide an appropriate education for M.M. until that time.

In his decision of February 4, 2002, the Commissioner concurred with the ALJ. In doing so, the Commissioner placed particular emphasis on the facts that under the terms of the Board's action, M.M. could apply for readmission to Livingston High School in May and that the Board was affording him educational programming during the period of his expulsion.

On February 28, 2002, petitioners appealed to the State Board of Education from the Commissioner's decision sustaining the validity of the Board's action in expelling M.M. On March 12, 2002, petitioners filed an application for emergent relief seeking M.M.'s immediate reinstatement to Livingston High School while the merits of their

appeal are being considered by the State Board or, in the alternative, continuation of the home instruction that the Board had been providing to M.M. since his expulsion.

In support of their motion, petitioners contend that it is likely that they will prevail on the merits of their appeal because the Board's action was procedurally deficient and M.M.'s misconduct did not rise to the level required to justify that action. They argue that M.M. will be irreparably harmed unless he is either readmitted to Livingston High School or provided with home instruction because none of the alternative education programs being offered by the Board are adequate.

In order for us to grant emergent relief in this case, we must be satisfied that: 1) absent such relief, M.M. will suffer irreparable harm, 2) his claim is based on a settled legal right, 3) there are no material facts in dispute, and 4) M.M. will suffer greater hardship if relief is denied him than that which the Board will suffer if such relief is granted. Crowe v. De Gioia, 90 N.J. 126 (1982). In addition, the presence of an issue of public interest is a factor to be weighed. Samaritan Center, Inc. v. Borough of Englishtown, 294 N.J. Super. 437 (Law Div. 1996). See Yakus v. United States, 321 U.S. 414, 440 (1944). See P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, decision on motion by the State Board of Education, October 3, 2001.

After careful review of the papers submitted in this case, we deny petitioners' application for emergent relief. Petitioners have not demonstrated a likelihood that they will succeed on the merits of their appeal. In this respect, we emphasize that Goss v. Lopez, 419 U.S. 565 (1975), does not entitle a student to a formal trial-type proceeding before a board of education may act to suspend him from school.

Nor have petitioners shown that absent the relief they are seeking, M.M. will suffer irreparable harm. The thrust of petitioners' argument is that M.M. has been sufficiently punished for any misconduct and that he should either be returned to Livingston High School or continue to be afforded home instruction pending disposition of petitioners' appeal to the State Board because he "poses no danger to the school environment," Petitioners' brief, at 48, and none of the alternative education programs being offered by the Board is appropriate for him. Specifically, petitioners point to the fact that M.M. is an outstanding student and had never been a discipline problem before engaging in the conduct that resulted in his expulsion. They assert that the alternative educational placements offered by the Board are not consistent with the requirements of the State Board as embodied in its decision in P.H. v. Board of Education of the Borough of Bergenfield, supra, contending that none of them provide an educational program that meets the core curriculum content standards. In support of this assertion, petitioners rely on an affidavit executed by M.M.'s father on November 21, 2001, and submitted to the Administrative Law Judge who considered this case. On this basis, petitioners contend that the Board is insisting that M.M. attend an "inadequate, inferior school" with "inferior teaching standards." Petitioners' brief, at 47-48.

We stress that the circumstances we are confronting in this case are far different than those presented by P.H. In P.H., the district board of education refused to provide a student with any education program while an appeal challenging his expulsion was pending before the State Board of Education. In stark contrast to the district board in that case, the Livingston Board has provided M.M. with home instruction since

completion of his incarceration[1] and is offering him the opportunity to select an alternative education program from among three suggested placements. In addition, it appears that the Board is willing to consider any suggestions from petitioners as to other alternative education programs. Board's brief, at 6.

All three of the alternative education programs being offered by the Board have been approved by the New Jersey Department of Education. While M.M.'s father attests that the Interim Alternative Education Program ("IAEP") located in Westfield is incapable of providing M.M. with instruction meeting the core curriculum content standards, this conclusion is based on M.M.'s father's perceptions and petitioners have provided no tangible evidence that the program offered through IAEP does not meet the criteria set forth in N.J.A.C. 6A:16-8.2 (application and approval process) or offered any justification for ignoring the Department of Education's approval. Nor have petitioners brought forth any evidence that the other two options being offered by the Board do not meet the approval criteria, which include the requirements that such programs provide individualized instruction that addresses the core curriculum content standards and that such instruction be provided by staff that is appropriately certified. N.J.A.C. 6A:16-8.2(a)(3) and (6).

As reflected in the certification of M.M.'s father, petitioners' objections center on the fact that IAEP, and presumably the other options being offered, may not offer an educational environment that "is even remotely like Livingston High School's" and their belief that such a program cannot meet the needs of M.M. "who all agree is a highly intelligent youngster who requires a challenging academic program." Certification of

[1] M.M. pleaded guilty to three violations of the New Jersey Criminal Code with regard to the incidents at issue and was adjudicated a delinquent. As a result of these incidents, he was detained at the Essex County Youth Detention Center.

A.M., at 3. Similarly, M.M.'s father objects to the therapy and counseling sessions that are part of the program as "entirely inappropriate and unnecessary for M.M." Id. at 9. Further, M.M.'s father contends that the absence of any ninth-grade students would be damaging to M.M., and he objects to the fact that physical education may only be offered three days a week, id. at 7, while at the same time preferring to keep his son on home instruction rather than enrolling him in IAEP.

Such objections do not render the options being offered by the Board inappropriate. All three options are approved educational programs, and there is no indication that any of them would deprive M.M. of "any meaningful or adequate education." Id. at 12. To the contrary, given the conduct for which M.M. is being disciplined, such placement is appropriate and, in offering these options, the Board properly recognized that under the circumstances here, home instruction on a long-term basis is not an appropriate educational option.

Therefore, for the reasons stated, we deny petitioners' application for emergent relief. Given our determination, it is not necessary to grant leave to petitioners so as to consider the letter they filed yesterday. Nor need we determine whether out-of-state co-counsel could file such letter without the signature of local counsel. See R. 1:21-2(b)(4).

April 3, 2002

Date of mailing _____