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
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

Decision on motion by the State Board of Education, April 3, 2002

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

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

This matter involves a challenge to an action taken by the Board of Education of the Township of Livingston (hereinafter "Board" or "Livingston Board") to expel M.M., then a ninth-grade student, from its schools with the provision that he could apply for readmission on or after May 15, 2002 for the 2002-03 school year. The action was taken on the basis of four incidents involving homemade explosive devices that culminated in M.M.'s arrest after he illegally entered Mount Pleasant Middle School on February 17, 2001, at which time he was an eighth-grade student at the school. At the

time of his arrest, M.M. was found to be in possession of a CO_2 cartridge filled with powdered model rocket fuel, which was taped to his leg, along with a fuse and a tube containing a road flair. It was subsequently learned that, on three previous occasions, M.M. had exploded such cartridges in a soda vending machine along an exterior wall of the school. On two of those occasions, he had added small nails to the cartridges.

Following his arrest, M.M. was detained at the Essex County Youth Detention Center, where he remained for approximately forty days. On April 3, 2001, he pled guilty to the charges that resulted from his arrest and was adjudicated a delinquent. Shortly thereafter, he was released from Essex County Youth Detention Center, but was confined to his home with an ankle bracelet, which he was allowed to remove on June 27, 2001. In August, he was allowed to attend summer camp in New England and, on August 15, he was placed in the Juvenile Intensive Supervision Program.

On September 10, 2001, the Board conducted a hearing and by letter dated September 12, 2001, M.M. was notified that he was expelled. The Board also offered to provide him with an alternative education placement and advised him that he could apply for readmission to the Livingston Board's regular education program for the 2002-03 school year on or after May 15, 2002.

On September 14, 2002, M.M.'s parents (hereinafter "petitioners") challenged M.M.'s expulsion by filing a petition of appeal with the Commissioner of Education. Their petition 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 the 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 also 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 an educational program during the period of his expulsion.

On February 28, 2002, the 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 were 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.

On April 3, 2002, we denied the petitioners' application for emergent relief.

At the petitioners urging, we have considered the merits of their appeal on an expeditious basis. By their appeal, the petitioners are seeking a ruling vacating the Board's determination of September 12, 2001 expelling M.M. with the provision that he could apply for readmission for the 2002-03 school year. Characterizing M.M.'s conduct as innocuous acts of petty vandalism, Appeal Brief, at 4, petitioners argue that the Board's action was arbitrary and unreasonable because M.M. did not have a prior disciplinary record and had a superb academic record at the time of his expulsion. In addition, they contend that M.M. has been punished enough for his conduct by the incarceration, house arrest, and probation imposed upon him by the juvenile justice system. Petitioners also claim that the Board's action violated M.M.'s federal and State constitutional rights, asserting that the Board reached its determination before conducting the disciplinary hearing and that M.M. was denied the opportunity to confront and cross-examine adverse witnesses.

After careful consideration of the arguments that have been presented, we affirm the Commissioner's decision for the reasons expressed therein. In so doing, we reject the petitioners' characterization of their son's actions as innocuous acts of petty vandalism. As well established by the record in this case, M.M. set off homemade explosive devices on school property on three separate occasions and brought an explosive device to school on a fourth occasion. He made those devices by loading CO_2 cartridges with crushed model rocket propellant, and he had added small nails on two occasions. Like the ALJ, we stress that the devices were both illegal and unsafe. Initial Decision, slip op. at 6. We also agree with the ALJ that the fact that M.M. ran

around the corner of the school building after lighting the fuses of the devices he had placed in the vending machine suggests that the devices were capable of causing personal injury. Id. It also suggests that M.M. was well aware of that fact. The fact that no one was hurt was fortuitous, but does not negate the seriousness of M.M.'s conduct. In this respect, the sentence imposed on M.M. in the criminal proceedings indicates that the Superior Court judge shared our assessment of the seriousness of his conduct.

We also reject the petitioners' contentions that the Board violated M.M.'s federal and State constitutional rights. As we emphasized in our decision denying emergent relief in this matter, 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 can we find any other authority that would confer such a right on M.M. in these circumstances. Like the Commissioner, we find that the Board provided the petitioners with an ample opportunity to be heard before acting to expel M.M. Commissioner's Decision, slip op. at 15. We also find that the Board did not deny the petitioners the ability to confront and cross-examine witnesses. The interchange between Board counsel and petitioners' attorney indicates that Board counsel sought to limit argumentation, but in no way suggests that petitioners' attorney was limited in his ability to cross-examine the Superintendent.

Similarly, while the petitioners disagree with the characterization of M.M.'s conduct, the conduct itself is not in dispute, and the Board did not consider the testimony of A.A., who had illegally entered the school with M.M., in reaching any factual conclusions as to that conduct. Rather, the Superintendent's reference to A.A. was solely to compare M.M.'s lack of remorse with the remorse shown by A.A. Such a

reference did not make A.A. an adverse witness. Finally, we reject as without merit the petitioners' assertion that preparation of a "draft" letter shows that the Board had predetermined the matter before the hearing.

In sum, for the reasons stated herein as well as those expressed by the ALJ and the Commissioner, we affirm the Commissioner's decision in this matter. In doing so, we stress that the action taken by the Board which is being challenged in these proceedings is not a permanent exclusion from the regular education program provided by the Livingston Board. Rather, M.M. was expelled from the regular program with the provision that he could apply for readmission on or after May 15, 2002,[1] and the Board provided M.M. with an alternative education program in the interim.[2] Given the conduct involved, this action was not arbitrary or unreasonable.

Edward Taylor abstained.

July 2, 2002

Date of mailing _____

[1] We note that the parties have not advised us as to whether M.M. has applied for readmission at this point.

[2] As set forth in our decision of April 3, 2002, we rejected the petitioners' claim that the alternative education programs were either inadequate or inappropriate.