

EDU #2799-99
C # 209-99E
SB # 34-99

V.A., on behalf of minor child, K.M.A., :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF COLLINGSWOOD, :
CAMDEN COUNTY, :
RESPONDENT-CROSS APPELLANT :

Decided by the Commissioner of Education, June 29, 1999
For the Petitioner-Appellant, Ellen M. Boylan, Esq. and Lenora M. Lapidus, Esq.
For the Respondent-Cross Appellant, Capehart & Scatchard (Robert A. Muccilli,
Esq., of Counsel)

This matter results from a determination by the Board of Education of the Borough of Collingswood (hereinafter "Board") to expel K.M.A., a fifteen year old student with no prior disciplinary record who had transferred into the district from private school in February 1999. The Board's action was based on an incident that occurred on March 23, 1999, during a computer lab for math class. After the lesson was finished, the teacher gave the students free time. K.M.A. used the free time to change the shutdown message on the computer screen from "It is now safe to turn off your computer" to "if you turn me off I will blow up."

A teacher encountered the message about an hour-and-a-half later and reported it to the principal, who investigated the matter. Upon questioning, K.M.A. acknowledged

that he had changed the message, but did not confirm that he had changed the wording to "if you turn me off I will blow up." However, a student who sat next to him told the administration that he had seen K.M.A. writing that specific message on the screen and, on March 25, 1999, K.M.A. wrote a letter of apology to the principal confirming that the choice of words was his. K.M.A. also indicated in his letter of apology that he had intended the message to be funny rather than threatening.

Nonetheless, when it had been reported to them, school administrators had perceived the message as a bomb threat. Consequently, K.M.A. had been administratively suspended for ten days by the principal, his mother was called, the police came, and K.M.A. was arrested.¹ Although the computer lab was closed for the day, the school was not evacuated and the bomb squad was not called.

The superintendent met with K.M.A. and his mother on April 13, 1999. At the end of that conference, the superintendent indicated that he was going to recommend to the Board that K.M.A. be expelled, as was his administrative practice in cases involving bomb threats.

The Board voted to expel K.M.A. at its meeting on April 29, 1999, noting that he could apply for readmission in September 1999 if he underwent counseling and was found to pose no threat. The superintendent's notice letter of April 29, 1999 indicates that the Board's determination was based on consideration of all of the testimony and evidence that had been presented at the meeting and that the Board had sought to evaluate the case on its own merit.

¹ The principal's letter of March 23, 1999, notifying petitioner of her son's suspension indicated that the suspension was for "using a computer to make a bomb threat and computer vandalism."

On May 5, 1999, K.M.A.'s mother (hereinafter "petitioner") petitioned the Commissioner for review, claiming that the expulsion was arbitrary, capricious, and unreasonable. She also sought emergent relief, contending that her son had not had a preliminary hearing as required by Goss v. Lopez, 419 U.S. 565 (1975), and that the Board's full hearing had not been conducted within the time limit required by New Jersey case law. Petitioner further asserted that the hearing was procedurally deficient because: 1) the superintendent had testified and had also been involved in the decision-making process, and 2) petitioner had not been supplied in advance with a summary of what the witnesses were expected to testify about.

The Administrative Law Judge ("ALJ") recommended that the Commissioner deny petitioner's application for emergent relief. In doing so, he rejected petitioner's procedural arguments and concluded that she had not shown a likelihood of success on the merits of her claim.

In his decision of June 29, 1999, the Commissioner concurred with the ALJ that there was no merit to petitioner's allegations that K.M.A. had not been accorded procedural due process. He also agreed that petitioner had not met the standards articulated in Crowe v. DeGioia, 90 N.J. 126 (1982) so as to be entitled to emergent relief. Although not addressed by the ALJ, the Commissioner also considered petitioner's attestations that her son had essentially been without educational services since his suspension. The Commissioner accepted the Board's representations relating to the provision of home instruction,² which he understood to mean that the Board was

² In order to fully and fairly examine the petitioner's attestations, the Commissioner had directed the Board to supplement the record with details regarding the extent of the home instruction it had been providing to K.M.A. since his suspension.

providing and would continue to provide sufficient home instruction to enable K.M.A. to complete his junior year. Accordingly, the Commissioner directed the Board to provide home instruction as indicated in its representations, and he returned the matter to the Office of Administrative Law for determination of the underlying claim that the Board's expulsion of K.M.A. was unreasonable under the circumstances.

On July 29, 1999, the petitioner appealed to the State Board of Education from the Commissioner's determination to deny emergent relief. However, at her counsel's request, the matter was placed in abeyance pending the Commissioner's decision in the underlying case.

On July 30, 1999, the petitioner moved to amend her petition to the Commissioner to raise constitutional claims, at which time the American Civil Liberties Union and the Education Law Center entered the case on behalf of the petitioner. On August 25, 1999, the Education Law Center filed an amended petition on behalf of petitioner, claiming therein violations of K.M.A.'s right to a thorough and efficient education under the New Jersey Constitution and equal protection under the Fourteenth Amendment of the United States Constitution.³

A plenary hearing was conducted before the ALJ on August 31 and September 21, 1999 on the merits of the petitioner's challenge to K.M.A.'s expulsion. At the hearing, it was established that the Board had provided K.M.A. with home instruction through the summer and that he had received credit for the spring semester. It was also established that three criminal charges had been filed against him as the result of

³ In addition, petitioner amended the relief she was seeking to include declaratory rulings relating to those claims, as well as a ruling that the Board had violated K.M.A.'s right to procedural due process under the Fourteenth Amendment. Petitioner also noted and preserved her right to claims for damages and attorneys fees under 42 U.S.C. §§1983 and 1988.

the March 23 incident, and that he had pled guilty to making a false alarm. For this offense, he had received nine month's probation and had been required to attend a fire safety program through the County Fire Marshall's office.

On August 4, 6, and 20, 1999, K.M.A. had been evaluated by Dr. Stephen G. Underwood, a psychiatrist, who concluded that K.M.A. posed no danger and should be readmitted to school. K.M.A. was also evaluated by the Camden County Division of the Fire Marshall, which found that K.M.A. was a low risk individual.

On August 23, 1999, petitioner applied to the Board for K.M.A.'s reinstatement, which was considered at the Board's August 30 meeting. At that point, petitioner had explored various options and was planning to send K.M.A. to live with his stepfather in North Carolina if this was necessary.

On September 2, 1999, the Board notified the petitioner that her request for reinstatement had been denied. The Board also indicated that it had no obligation to educate K.M.A. since he was residing in North Carolina, but that if he returned, the Board was prepared to offer him the option of attending an alternative education program. Consequently, K.M.A. stayed in North Carolina and attended public school there during the 1999-2000 school year.

In his Initial Decision of February 2, 2000, the ALJ rejected the Board's argument that the matter was moot because K.M.A. was not domiciled in Collingswood. Then, stressing the broad policymaking discretion afforded to district boards of education, the ALJ assessed the factual circumstances to evaluate whether the Board's determination to expel K.M.A. was arbitrary and capricious.

Under this standard and on the assumption that the Board took each case on its own merits, the ALJ concluded that expulsion was too harsh a remedy in this instance. In so concluding, the ALJ stressed that K.M.A. had never been in any trouble at any school prior to this incident and that he had not been motivated by a nefarious intent. The ALJ also stressed that K.M.A. had paid a considerable price for his lack of forethought by being arrested and pleading guilty to making a false alarm, by being out of school from March 23, 1999 to the end of school, and by relocating out-of-state to live with his stepfather. In addition, K.M.A. had been evaluated by a psychiatrist during the summer of 1999, and the Board had the psychiatrist's report when it denied readmission. The ALJ rejected the Board's argument that its determination not to readmit K.M.A. was reasonable because K.M.A. had not obtained counseling, finding that the record reflected no specific directive from the Board. In short, the ALJ determined that under the circumstances, suspension until the end of the 1998-99 school year was warranted, but that the Board's action in permanently expelling K.M.A. "from the mainstream" was arbitrary and capricious. Initial Decision, slip op. at 9. Since the ALJ concluded that K.M.A.'s expulsion violated the education laws, he found it unnecessary to address the petitioner's constitutional arguments at length.

By his decision of March 20, 2000, the Commissioner adopted the ALJ's decision on the basis of his own review of the record, including the transcripts. In addition, the Commissioner emphasized that because of the timing of K.M.A.'s arrival in the district in 1998-99, the circumstances here included the fact that he was unaware of the administration's practice of recommending expulsion to the Board in all cases involving bomb threats. For this reason as well, the Commissioner concurred with the ALJ that

permanently severing K.M.A.'s entitlement to a free public education in the district was not a reasonable sanction. Hence, the Commissioner directed that K.M.A.'s record reflect that he was entitled to reinstatement for the 1999-2000 school year. However, without any discussion, the Commissioner added that if K.M.A. applied for readmission, the Board could conduct an evaluation as to whether a return to the regular school environment or an "alternative placement" was warranted. Commissioner's Decision, slip op. at 15.

On April 14, 2000, the petitioner filed a notice of appeal to the State Board from the Commissioner's decision on the merits, and on April 19, 2000, the Board filed a cross-appeal. On May 15, 2000, the petitioner filed a brief in support of both her appeal from the Commissioner's decision of June 29, 1999 denying emergent relief and from the Commissioner's decision of March 20, 2000, in which he had decided the merits of the dispute.

Because our decision will determine where K.M.A. will attend school this fall, and at petitioner's request, we have expedited our consideration of this matter. Accordingly, we adjusted the briefing schedule so that the Board's brief in support of its cross-appeal was filed on June 21, 2000, and petitioner's reply brief on June 26.

In her appeal, petitioner renews her challenge to the constitutionality of the Board's decision to permanently expel K.M.A. As she did before the ALJ and Commissioner, petitioner contends that by not holding a full disciplinary hearing within 21 days of the initial suspension and by failing to provide a written summary of the proposed witness' testimony in advance of the hearing, the Board had violated the due

process clause of the Fourteenth Amendment of the United States Constitution.⁴ In addition, she challenges the Commissioner's determination that the Board could make K.M.A.'s reinstatement subject to an alternative placement, arguing that this determination is arbitrary, capricious and unreasonable under the circumstances.

The Board argues that its decision to expel K.M.A. was not arbitrary, capricious, or unreasonable. It maintains that because, as the ALJ found in denying emergent relief, K.M.A.'s procedural rights were not violated, petitioner's appeal should be denied. It urges affirmance of the Commissioner's directive relating to an evaluation of K.M.A. by the Board.

After careful consideration of the record, including the transcripts, and for the reasons expressed by the ALJ and the Commissioner, as well as those expressed herein, we affirm the Commissioner's determination that the Board's action in permanently expelling K.M.A. from school was arbitrary and unreasonable under the circumstances presented.

Based on our review of the record, we fully concur with the ALJ that K.M.A.'s conduct in changing the computer message was not the result of any nefarious intent. Rather, as reflected by the testimony, K.M.A.'s conduct was intended as a prank, and not as a bomb threat. Tr. 8/31/99, at 72-3 to 72-9. Nonetheless, we find that the school administrators' initial perception that the message might, in fact, be a bomb threat was reasonable under the circumstances. However, we also find that the record demonstrates that such initial perception was dispelled once the matter was investigated. Not only does the testimony show that the principal was aware that there

⁴ We note that petitioner has not in this appeal challenged the constitutional sufficiency of K.M.A.'s initial suspension by the principal.

was not a bomb, tr. 8/31/99, at 180-1 to 180-16, 194-21 to 195-5, but the fact that the bomb squad was not called and the building was not evacuated also indicates that the administration had concluded that there was no bomb. In this respect, we stress that had the principal believed that the message represented a serious threat to the safety of the students, his responsibility for their safety would have compelled him to evacuate the building. Tr. 8/31/99, at 184-6 to 184-16. Moreover, although the computer lab was closed for the day, that was the extent of any disruption to the school.

Furthermore, as the ALJ found, K.M.A. had not had any disciplinary problems in any of the schools he had attended. While K.M.A. indicated that he was not prepared to make the commitment to academic work that Bishop Eustice, where he was previously a student, demanded of its students, tr. 8/31/99, at 79-1 to 79-5, it was his choice to transfer and there is nothing in the record to suggest that he had any academic problems in middle school. To the contrary, he was in the gifted and talented program when he attended Collingswood Middle School. Tr. 8/31/99, at 12-17 to 12-22.

Like the ALJ and the Commissioner, we emphasize that the determination to expel K.M.A. was made by the Board and not by the principal or the superintendent. Petitioner made no showing that the Board failed to fulfill its obligation to consider K.M.A.'s case on an individual basis.⁵ As the testimony reflects, while school administrators followed a "zero tolerance" policy, such policy was not one that had been adopted by the Board. Tr. 8/31/99, at 202-3 to 202-10; tr. 9/21/99, at 102-23 to 103-4, 103-7 to 103-11. At the same time, we cannot ignore that, as found by the ALJ, the timing of K.M.A.'s transfer into Collingswood High School was such that neither he nor

⁵ We note that the petitioner did not provide any transcripts of the hearing held before the Board.

his mother had been provided with notice of the district's administrative policy by school officials. Tr. 8/31/99, at 202-11 to 202-16, 203-4 to 203-24; tr. 9/21/99, at 29-6 to 29-18.

In sum, we affirm the Commissioner's determination that the permanent expulsion of K.M.A. was arbitrary, capricious, and unreasonable in these circumstances, and we agree that suspension from the date of the incident at issue, March 23, 1999, through the end of the 1998-99 school year was the appropriate sanction for K.M.A.'s conduct.

We, however, modify the relief to which K.M.A. is entitled. Under the circumstances, we preclude the Board from mandating that K.M.A. attend an alternative education program such as Gloucester County Alternative School and direct that the Board readmit K.M.A. to the regular education program provided at Collingswood High School. As the petitioner argues, such alternative programs are designed for students who have difficulty succeeding in a regular school setting because of persistent behavioral or educational problems, often related to drugs or alcohol. In that the evaluation conducted by Dr. Underwood concludes that K.M.A. does not have such problems and is no danger, given the nature of the conduct involved, and because this is the only incident in which K.M.A. has been involved that has required disciplinary action, we conclude on the basis of the record that requiring K.M.A. to attend an alternative education program would be arbitrary.

Therefore, for the reasons stated herein as well as those expressed by the ALJ and the Commissioner, we set aside the Board's determination to permanently expel K.M.A. from school. Rather, we have concluded, as did the ALJ, that suspension from March 23, 1999 through the end of the 1998-99 school year was the appropriate

sanction under the circumstances. As set forth in the ALJ's decision, K.M.A. has already paid a considerable price for his conduct by his exclusion from school during the 1998-99 school year, his arrest and guilty plea for making a false alarm, and the fact that, because he was not reinstated for the 1999-2000 school year, he had to relocate to North Carolina to live with his stepfather in order to attend public school. Initial Decision, slip op. at 9. Hence, from both an educational and legal perspective, it is appropriate at this point that K.M.A. be readmitted to the regular education program at Collingswood High School.

In view of our determination that the Board's action in expelling K.M.A. was arbitrary and unreasonable and as the ALJ and Commissioner concluded, it is not necessary for us to address the petitioner's constitutional claims at length in the context of this appeal. We, however, note that although the Board contends that the Commissioner's decision denying emergent relief correctly resolved petitioner's claims of procedural deficiencies raised in this appeal, the petitioner has not directly challenged the totality of the Commissioner's decision denying emergent relief. Rather, as set forth in her brief, the petitioner's constitutional claims are limited to the timeliness of the Board hearing and its failure to provide a summary of witness testimony in advance.,

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000