EDU #2799-99
C # 209-99E
C # 94-00
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 BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT-CROSS/APPELLANT.	:	

Decided by the Commissioner of Education, June 29, 1999

Decided by the Commissioner of Education, March 20, 2000

Decided by the State Board of Education, July 5, 2000

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)

On July 5, 2000, we rendered our decision in this matter, holding, as had the Administrative Law Judge ("ALJ") and the Commissioner, that the action of the Board of Education of the Borough of Collingswood (hereinafter "Board" or "Collingswood Board") in permanently expelling K.M.A. from Collingswood High School was arbitrary and unreasonable under the circumstances. As set forth in our decision, the Board's action resulted from an incident that had occurred on March 23, 1999, during a computer lab for math class. During free time in the lab, K.M.A. had changed 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.”

School administrators perceived the message as a bomb threat and following a conference with K.M.A. and his mother, the superintendent recommended to the Board that K.M.A. be expelled. The Board voted to expel K.M.A. at its meeting on April 29, 1999, noting that he could apply for readmission in the fall if he underwent counseling and was found to pose no threat.

K.M.A.’s mother challenged the Board’s action by filing a petition with the Commissioner of Education and by seeking emergent relief.

In his decision of June 29, 1999, the Commissioner denied petitioner’s application for emergent relief. In doing so, he concurred with the ALJ that there was no merit to allegations made by petitioner that K.M.A. had not been accorded procedural due process.

On July 29, 1999, the petitioner appealed to the State Board of Education from the Commissioner’s determination to deny emergent relief. However, at the request of petitioner’s counsel, 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 the 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.[1]

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. On September 2, 1999, the Board notified the petitioner that her request for reinstatement had been denied.

Following a plenary hearing on the merits of the controversy, the ALJ found the Board's action in expelling K.M.A. was arbitrary and unreasonable. Since he concluded that K.M.A.'s expulsion violated the education laws, the ALJ found it unnecessary to address the petitioner's constitutional arguments at length.

Based on his review of the record, the Commissioner concurred with the ALJ that K.M.A.'s expulsion was arbitrary.

In her appeal to the State Board, petitioner renewed her challenge to the constitutionality of the Board's decision to permanently expel K.M.A. As she did before the ALJ and the Commissioner, petitioner contended 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 witnesses' testimony in advance of the hearing, the Board had violated the due process clause of the Fourteenth Amendment of the United States Constitution. In addition, she challenged the Commissioner's determination that the Board could make K.M.A.'s reinstatement subject to an alternative placement, arguing that this determination was arbitrary, capricious and unreasonable under the circumstances.

[1] 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.

Upon review of the record, the State Board concurred with the ALJ and the Commissioner that K.M.A.'s conduct was not the result of any nefarious intent. Rather, the State Board found that, as reflected by the testimony, K.M.A.'s conduct was intended as a prank, not as a bomb threat. Nonetheless, the State Board found that the school administrators' initial perception that the message might, in fact, be a bomb threat was reasonable under the circumstances. However, the State Board further concluded that such perception was quickly dispelled once the matter was investigated.

Although the State Board agreed with the Commissioner that K.M.A.'s permanent expulsion was unreasonable under the circumstances, it modified the relief granted to K.M.A. The State Board directed that the Collingswood Board readmit K.M.A. to the regular education program at Collingswood High School, and it precluded the Board from mandating that K.M.A. attend an alternative education program.

In view of our determination that the Board's action in expelling K.M.A. was arbitrary and unreasonable, we concluded that it was not necessary for us to address the petitioner's constitutional claims at length in the context of the appeal before us. We, however, noted that petitioner's constitutional claims were limited to the timeliness of the Board hearing and its failure to provide a summary of witness testimony in advance.

On July 19, 2000, petitioner moved for reconsideration of that portion of the State Board's decision that declined to decide her constitutional claims. Petitioner argued that although the Commissioner and the State Board did not have the authority to award attorney fees, she was entitled to vindicate her son's constitutional rights so as to seek those fees in an appropriate forum subsequent to a final administrative ruling. She

contended that the claims challenged district-wide policies and practices affecting many children and were therefore not moot.

Initially, we grant the petitioner's motion to reconsider. However, for the reasons that follow, we decline to alter our previous decision so as to rest that decision on constitutional grounds.

It is well settled that a court should not reach constitutional questions unless necessary to the disposition of the litigation. E.g., O'Keefe v. Passaic Valley Water Com'n, 132 N.J. 234, 241-242 (1993). Quite simply, the fact that the State Board determined that the Collingswood Board's expulsion of K.M.A. was in violation of the education laws made it unnecessary for us to reach the constitutional questions raised by the petitioner in order to dispose of the matter before us. Petitioner's desire to ultimately collect attorney fees under 42 U.S.C. §§1983 and 1988 did not change the character of the appeal that was before the State Board. Nor did it alter the scope of our jurisdiction. In this respect, we stress that we do not have the jurisdiction to decide claims made under §1983, and that we do not have the authority to award attorney fees pursuant to §1988.

Nor, despite petitioner's assertions, did the appeal involve a challenge to the Board's policies or practices. There is no indication in the record that the procedural defects alleged by petitioner in the appeal were the result of any Board policy or practice, and petitioner has not provided any support for this assertion in her motion for reconsideration. Accordingly, there is no indication that any other students will be affected by our determination that it was not necessary to rule on the constitutional issues.

Consideration of the brief filed in H.R. v. Rahway Board of Education, Commissioner David C. Hespe, and the State Board of Education, EDU #5449-CON, which petitioner has submitted in support of her motion, does not change our conclusion. Although filed on behalf of the Commissioner and the State Board, this is a brief in support of a motion for summary judgment in a case currently pending before the Office of Administrative Law. As such, it is not pertinent to the matter now before us.

Moreover, petitioner has not shown the necessity of setting aside the Commissioner's analysis of her constitutional claims. As the Commissioner stressed, R.R. v Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337 (App. Div. 1970), held that a student charged specifically with assault had to be afforded a full hearing before the district board within 21 days of suspension pursuant to N.J.S.A. 18A:37-2.1 as then in effect. That statute applies only to students charged with assault and, in any event, was amended in 1995 to provide that such hearing must be provided within 30 days of suspension, rather than 21.

The case now before us involved a perceived bomb threat and not an assault. Consequently, the controlling statutes are N.J.S.A. 18A:37-4 and N.J.S.A. 18A:37-5, which provide that a hearing must be conducted by the second regular board meeting following an administrative suspension. As found by the Commissioner, K.M.A. was afforded a full hearing at the next regular meeting of the Collingswood Board in full compliance with N.J.S.A. 18A:37-4.

Similarly, there is no merit to the petitioners' claim that under the circumstances presented, due process entitled her to a summary of the witnesses' testimony prior to

the Board hearing. Tibbs v. Bd. of Ed. of Tp. of Franklin, 114 N.J. Super. 287 (App. Div. 1971), aff'd, 59 N.J. 506 (1971), upon which petitioner relies, does not confer any such entitlement on the petitioner.

Tibbs involved the expulsion of five students for allegedly assaulting two other students. In a per curiam decision, the Appellate Division reversed the expulsions, stating only that it was doing so "for failure to produce the accusing witnesses for testimony and cross-examination." Tibbs, 114 N.J. Super. at 288. The Appellate Division's decision was accompanied by three concurring opinions. The Supreme Court also issued a per curiam decision in the case, affirming the Appellate Division's decision for the reasons expressed in the concurring opinion of Judge Kolovsky. 59 N.J. 506, 507 (1971).

Neither the language of the decisions in Tibbs nor Judge Kolovsky's concurrence hold that a student is entitled to a summary of witness testimony in advance of a full board hearing. Rather, as explicated in Judge Kolovsky's concurrence, Tibbs centered on the due process requirement that "a respondent charged with misconduct in a hearing before a governmental agency be given the opportunity to confront and cross-examine adverse witnesses where the decision of the governmental agency will turn on questions of fact." 114 N.J. Super. at 301. While recognizing that the Commissioner had previously held that accused students were entitled to be given at least the names of the witnesses against them and copies of their statements and affidavits, Judge Kolovsky's concurrence articulated the due process requirement that such witnesses appear in person so that, in the absence of an appearance, the witnesses' statements could not be considered or relied on by the board. Id. at 300.

As the Administrative Law Judge in this case concluded, Tibbs does not hold that an accused student is automatically entitled to a summary of the witnesses' testimony where the witness appears in person. Initial Decision on emergent relief, slip op. at 4. Further, as the Commissioner stressed, K.M.A.'s conduct in this case was admitted and the hearing was solely to determine the appropriate penalty. Commissioner's Decision of June 29, 2000, slip op. at 10.

In sum, although we note the presence of petitioner's constitutional claims and have provided our insights, Abbott v. Burke, 100 N.J. 269, 298-99 (1985); Bd. of Ed. v. Neptune Educ. Ass'n., 293 N.J. Super. 1, 9 (App. Div. 1996), we decline to alter our determination that it was unnecessary for us to decide those issues.

October 4, 2000

Date of mailing _____