359-00

M.G. AND M.G., on behalf of minor child, A.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents appealed the expulsion of their son, A.G., alleging inappropriate procedures prior to expulsion and denial of due process. The Board expelled him following two findings that he was under the influence of marijuana.

The ALJ found that based upon the circumstances of this case, the school's decision to require that A.G. be tested was fully supported by a reasonable suspicion that he was under the influence of drugs. The ALJ found that common sense and legal precedent supported the decision to follow the mandate of *N.J.S.A.* 18A:40A-12 and have A.G. examined. Moreover, the ALJ determined that although the hearing process was flawed to some extent, it was apparent that the flaws did not cause the Board to act arbitrarily. The ALJ noted that the Board only acted to expel A.G. after he received fair warning via the suspension following the first positive test that he had to refrain from marijuana use and that he would be subject to random testing; yet, when he underwent the random test, he was again shown to be under the influence of marijuana. The ALJ determined that the Board did not act arbitrarily given the strong State policy against drugs in school and its Substance Abuse Policy No. 5530. Petition was dismissed. A.G. was expelled from the school system.

The Commissioner affirmed in part, reversed in part the Initial Decision of the ALJ. Citing *In re Graceffo*, the Commissioner determined that A.G. was properly referred for a medical examination by a staff member who observed symptoms of drug use and advised the designated administrator (assistant principal) of such. (The principal or designee may not substitute his judgment for that of the referring staff member.) However, the Commissioner finds that the Board's decision to expel A.G. was not compelled by its policy; yet the Board turned to this ultimate sanction without considering all pertinent factors, including other options such as alternative education programs. The Commissioner directed the Board to readmit A.G. to its District and to determine, consistent with his decision, whether expulsion is the appropriate result under all the circumstances of A.G.'s case. The Commissioner did not retain jurisdiction.

November 6, 2000

OAL DKT. NO. EDU 06743-00S
AGENCY DKT. NO. 316-7/00

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners' exception arguments maintain that: (1) the Administrative Law Judge (ALJ) erred in ruling that the Board did not need to obtain parental consent "prior to performing A.G.'s first drug test" (Petitioner's Exceptions at 1, 2); (2) the ALJ improperly concluded that the Board did not act arbitrarily and capriciously in finding that "there was reasonable suspicion for A.G.'s first drug test" (*Id.* at 5); (3) the ALJ erred in ruling that the Board did not contravene *N.J.S.A.* 18A:40A-10; and (4) their due process rights were violated by the Board's failure to offer a transcript of the hearing conducted at the local level.

In reply, the Board asserts that: (1) with respect to the factual issue of whether M.G. gave her consent to have A.G. examined, petitioners "have no business mentioning unsupported testimony from a record they chose not to submit***," (Board's Reply at 1, 2); (2) the ALJ "accurately interpreted *N.J.S.A.* 18A:40-12 as not requiring a school district to present a parent with a choice of electing not to have a student tested who has met the reasonable

suspicion standard in the opinion of a staff member" (*Id.* at 4); (3) there was no need to present the referring teacher as a witness at the Board hearing (*Id.*); (4) the ALJ's discussion at page four of the Initial Decision with respect to the alleged violation of *N.J.S.A.* 18A:40A-10 should be affirmed; and (5) petitioners' due process argument lacks merit, since they never raised in their pleadings the issue of the absence of a record of the Board's proceedings and they are wrong in alleging that there was an unfair shifting of burdens. (*Id.* at 5)

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm in part and reverse in part the Initial Decision of the ALJ for the reasons set forth below.

This matter concerns a district's dual responsibility to arrange for the immediate *medical examination* of a pupil when a staff member suspects that he is under the influence of alcohol or other drugs at school or a school-sponsored function, and, where that suspicion is substantiated, to ensure that he receives appropriate follow-up services.

As the ALJ properly noted, the relevant statute, *N.J.S.A.* 18A:40A-12, as set forth in the Initial Decision, *does not* require that a parent's, or guardian's, consent be obtained before a pupil receives a medical examination for the purpose of diagnosing whether he is under the influence of alcohol or other drugs.[1] Instead, the statute provides a parent/guardian, upon notification, with the option of choosing that the examination be performed

> by a doctor selected by the parent or guardian, or if that doctor is not immediately available, by the medical inspector,[2] if he is available. If a doctor or medical inspector is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital for examination accompanied by a member of the school staff designated by the principal and a parent or guardian of the pupil, if available. *N.J.S.A.* 18A:40A-12.

[1] In so finding, the Commissioner concurs that it is unnecessary to determine the factual dispute underlying this issue.

[2] A medical inspector is a physician licensed to practice medicine and surgery within the State who serves under contract with the Board. *See N.J.S.A.* 18A:40-1.

Further, it is the staff member's report of suspicion, based on articulated observations of specific indicators of alcohol or other drug use, which compels that a principal, or his designee, arrange for an immediate medical examination. As the Commissioner has recently instructed:

> *********N.J.S.A.* 18A:40A-12, is part of a larger enactment intended to establish a comprehensive public school program for prevention of substance abuse and provision of assistance to students affected by it. Within this context, it is clear that *N.J.S.A.* 18A:40A-12 is intended to provide a "safety net" for students through its requirement that the school system identify and obtain assistance for any student who may be under the influence of drugs, alcohol or other substances of abuse. By its own terms, the statute plainly envisions that not every student so identified will necessarily be found to be under the influence in fact, but the framework it establishes errs on the side of protecting the health and well-being of students by ensuring that no student falls through the cracks and that assistance is provided where needed, whether sought by the student or not.
>
> The framework established by the Legislature for this purpose assigns clear and distinct roles to various staff members. *N.J.S.A.* 18A:40A-12 initially requires "any teaching staff member, school nurse or other educational personnel" to whom it appears that a student may be under the influence of drugs or alcohol to "report the matter as soon as possible" to the school nurse, medical inspector or substance awareness coordinator, and to the principal or designee. Thereupon, the principal shall immediately notify the chief school administrator and the parent or guardian, and shall arrange for immediate medical examination of the pupil by the doctor selected by the parent/guardian, or if unavailable, the medical inspector, or if unavailable, the emergency room of the nearest hospital.
>
> Nowhere in the statute is the principal or designee given the authority to substitute his/her judgment for that of the referring staff member, *once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the observations, symptoms and indicators underlying this conclusion.* *** There is nothing in the plain language of *N.J.S.A.* 18A:40A-12, nor in its legislative history, to indicate that the statutory provision requiring an immediate medical examination was not intended to be mandatory upon a staff report of a student who appeared, based on specific observed indicators, to be under the influence of alcohol or other drugs.[3] ***

[3] *N.J.A.C.* 6:29-6.5 (adopted, 1987; amended, 1989; effective, July 1, 1990) mirrors the statutory language. The Commissioner notes that the State Board of Education is currently considering recodification of this provision without change under *N.J.A.C.* 6A:16-4.3.

> Within this framework, the mandatory medical examination is, therefore, triggered upon referral from the teaching staff member based upon the *staff member's* observation of specific indicators and determination based upon them that the student appears to be under the influence of alcohol and/or drugs. There is nothing in *N.J.S.A.* 18A:40A-12 suggesting, much less authorizing, once a report has been made, that the designated administrator may first seek to validate the referring staff member's observations or judge the reasonableness of his or her conclusions before taking the actions required by statute. Instead, the administrator must act once the student has been reported, i.e., once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the basis for this conclusion so that the administrator may convey the necessary information to parents and medical providers when they are contacted as required by law. *** Additionally, while a nurse may examine the student and the principal may ask the referring staff member to more fully describe the observations leading to his or her report, it is the referral itself that, under *N.J.S.A.* 18A:40A-12 and *N.J.A.C.* 6:29-6.5, unequivocally requires the principal or his designee to arrange for an *immediate medical examination* of the student. (emphasis in text) (*In the Matter of the Tenure Hearing of Joseph Graceffo, School District of the Township of Wayne*, Passaic County, Commissioner Decision, September 21, 2000, Slip Op. at 54-57)[3]

Here, according to the record, "[t]he teacher cited sleeping in class, glassy eyes, and complaints of nausea as reasons for [A.G.'s] referral to the Assistant Principal." (Exhibit R-3, Expulsion Packet, Narrative of Incident) As stated above, once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the observations, symptoms and indicators underlying this conclusion, the principal or designee may not substitute his judgment for that of the referring staff member. *Graceffo, supra*, at 55. Therefore, although the observations of the vice principal and the school

nurse may have served to *reinforce* the referring teacher's suspicion in this instance, these observations are essentially irrelevant to the question of whether the referral itself was proper, since neither staff member is legally permitted to thwart the required medical examination. The Commissioner, therefore, determines that A.G. *was* properly referred for a medical examination on December 21, 1999.[4] Furthermore, even assuming, *arguendo*, that a medical examination conducted pursuant to *N.J.S.A.* 18A:40A-12 would constitute a search of a student so as to subject it to the standards set forth in *New Jersey v. T.L.O., supra*, contrary to petitioners' urging, there can be no doubt on this record that the "search" was "justified in its inception" (Initial Decision at 6 citing to *New Jersey v. T.L.O., supra* at 341-42) based upon the referring teacher's articulation of symptoms undisputedly exhibited by A.G. on December 21, 1999 which may reasonably be associated with substance use.

Once A.G. was determined by a physician to be under the influence of marijuana on December 21, 1999, the law required that his attendance at school could not resume until he submitted to the principal a written report, prepared by a personal physician, the medical inspector or the physician who examined him pursuant to the provisions of the enabling statute, that he was physically and mentally able to return to school. *N.J.S.A.* 18A:40A-12. Although it is not clear from the record that petitioners, in fact, presented the District with such a report,[5] *or* that the District adhered to its adopted procedures which conditioned a student's return to school

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[3] The Commissioner notes that his decision in the matter entitled *In re Graceffo, supra,* was issued on September 21, 2000 and the ALJ did not, therefore, have the benefit of reviewing it prior to issuing his initial decision in the instant matter.

[4] To the extent the Board's policy references "urine analysis," or "drug testing," the Board is cautioned, as noted in *Graceffo, supra*, that "*a drug test does not equate to a medical examination* within the requirements of the statute***." (emphasis in text) (*In re Graceffo, supra*, Slip Op. at 66)

[5] Exhibit P-3 in evidence appears to be a handwritten note of petitioners' conversation with Mr. Spector on December 21, 1999. The note details that A.G. would receive a five-day out of school suspension, followed by a five-day in-school suspension. It further reads, "Return to school Jan.14th *** Must have parent conference, referral to conselor (sic) (private too?) letter from Dr./or Hosp. to 'clear' for drugs. No charges but police write up. [Two] random drug tests (same as athletic students) when back in school. Mr. Spector—Bound to policy – no grey areas."

under these circumstances,[6] A.G. nevertheless returned to school on January 6, 2000, following a five-day out of school suspension, to serve his five-day internal suspension.

The Commissioner notes that *N.J.S.A.* 18A:40A-12 requires that, upon such student's return to school, a substance awareness coordinator (SAC) or other appropriately trained teaching staff member shall interview the student for the purpose of determining the extent of his involvement with substances and his possible need for treatment. After such investigation, if it is determined that his involvement with substances represents a danger to the student's health and well-being, the SAC or other appropriately trained staff member is obligated to refer the student to an appropriate treatment program. *N.J.S.A.* 18A:40A-12. Here, the record reflects that:

> [A.] returned for his internal suspension on January 6, 2000 where [Assistant Principal] Mr. Spector held a return conference with [A.] and his mother. Student Assistant Coordinator, Marjorie Chassels, was also in attendance. Mr. Spector presented Mrs. [G.] with the policy and procedures for a positive drug screen. Included in his presentation was the parents (sic) and students (sic) responsibility to: a) adhere to the treatment recommended by the testing center and b) agree to undergo two random drug screens during the next three months. As well, Mrs. [G.] was informed that a subsequent positive test or not adhering to the recommended treatment would result in a possible expulsion from school. Mr. Spector had Mrs. [G.] signed (sic) attachment H of policy 5530 acknowledging such.
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> At the meeting January 6, Mrs. Chassels informed Mrs. [G.] that [A.] was recommended to undergo three days a week of intensive drug therapy.
>
> Student Assistant Coordinator, Rick Fanslau, met with [A.] each of the five days he was an (sic) internal suspension.

[6] An attachment to the Board's policy entitled "Procedures for Mandated Alcohol/Drug Evaluation" (Exhibit R-4, Substance Abuse Policy No. 5530, Attachment C at 12) sets forth the parties' responsibilities in the event a student receives "a positive urine screening." Specifically, the student is *not permitted to return to school* until: the parents/guardians have submitted the physician's certification, noted *supra*; an evaluation is completed "by the contracted service provider to determine the extent of the student's involvement with alcohol/drugs and possible need for treatment"; the parents/guardians have agreed to participate in a preventive/intervention drug counseling program; and the student and parents/guardians have agreed to the student's participation in two random drug screenings. (*Id.*)

> On February 22, 2000, Assistant Principals Scott Hoopes and Jeff Spector took seven 9th and 10th grade students for random drug screens. This was per district policy for students who had previously tested positive for a controlled dangerous substance. This was the first of [A.]'s two random screens. ***
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> The test result was positive for the same substance as the previous screen.
>
> Mr. Spector inquired of both Mr. and Mrs. [G.] and the Behavioral Health Center as to whether or not [A.] had been undergoing the prescribed intensive therapy. Both Mr. and Mrs. [G.] confirmed that [A.] had not undergone one day of substance abuse counseling from the date of his first positive test to the date of the second positive test. The Behavioral Health Center acknowledged that [A.] was not receiving counseling at their facility. In the best interest of [A.], Mr. Spector urged Mr. [G.] to enroll [A.] in counseling as quickly as possible.
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> On February 23, 2000, one day after the second positive screen, Mr. [G.] informed Mr. Spector that [A.] was enrolled in counseling at the Behavioral Health Center. On February 29, 2000, Don Keller from the health center confirmed [A.] had begun counseling.
> (Exhibit R-3, Expulsion Packet, Narrative of Incident)

The Board's policy provides that if a pupil is found to be under the influence of alcohol or other drugs for *a second time* during his enrollment in Washington Township High School, then such pupil will be excluded from school *pending a Board of Education expulsion hearing*.[7] (Exhibit R-4, Substance Abuse Policy No. 5530 at 5) In this instance, the District's "Expulsion Packet" was apparently submitted to the Board on March 2, 2000, approximately one week after A.G.'s second positive finding of marijuana, and the Board conducted its expulsion hearing on April 17, 2000, evidently without further documentation as to A.G.'s progress, if any, in treatment. A.G. was placed on home instruction until his sixteenth birthday, when the Board

[7] In this regard, the Commissioner finds that the ALJ properly rejected petitioners' claim that the Board failed to comply with *N.J.S.A.* 18A:40A-10, which requires the Board to provide, to pupils and parents, copies of its policy statement concerning the identification, evaluation, referral to treatment and discipline of pupils who are substance abusers. (Initial Decision at 4)

terminated educational services to him.[8] (Petition of Appeal at 7, paragraph 31) The Board's Expulsion Packet details A.G's academic, disciplinary and attendance record. The Commissioner therein notes, *inter alia*, that A.G. was, in the 1999-2000 school year, a ninth grader with a disciplinary record which included one incident of cutting class on December 14, 1999, approximately one week before his medical examination, and one incident of cutting a teacher's detention on December 21, 1999, the same date as the medical examination.[9]

As to the actual expulsion hearing, petitioners claim deficiencies in the hearing which, they assert, compromised their due process rights. Here, the Commissioner first concurs with the ALJ that the Board's counsel was not obligated to call Ms. Pasquarel, the referring teacher, as a witness at the expulsion hearing. However, the Commissioner nonetheless finds that the Board's decision to conceal the identity of this teacher from petitioners, without explanation, is troubling, particularly, in light of the severe and permanent sanction which ultimately arose from her referral, albeit a proper one. Again, the Commissioner underscores that it was Ms. Pasquarel's belief that A.G. was under the influence of a substance, together with her identification of specific symptoms or indicators of alcohol or other drug use, which were to "trigger" the ensuing medical examination. For this reason, petitioners' attempt to impeach the testimony of Mr. Spector at the Board's expulsion hearing conducted on April 16, 2000 by cross-examining him on the issues raised in the tape produced by petitioners can be to no avail,[10] where petitioners do not refute *the observations* made by Ms. Pasquarel, notwithstanding that they challenge the *conclusion* which she drew from her observations, alleging that "A.G. was sleepy, nauseous, and had glassy eyes on or about December 21, 1999 because he had been up late the night before ***." (Petition of Appeal at 6, paragraph 23)

[8] The record indicates that A.G.'s sixteenth birthday was August 15, 2000.
[9] Exhibit R-3 also includes A.G.'s disciplinary record from the eighth grade, which included one incident of refusing to come to school (March 3, 1999), one "misuse of pass" on March 8, 1999 and one incident where he was in possession of a knife, on May 3, 1999, for which he received five days of internal suspension. (Exhibit R-3)

Additionally, although petitioners claim that their failure to receive an "intelligible recording of the Board hearing" denied them due process "insofar as [they were] placed in the untenable situation during the plenary hearing of having the burden shifted to them in a proceeding where there was no means for effective cross-examination during the plenary hearing of respondent's witnesse[s] who were called during the Board hearing" (Petitioners' Exceptions at 7), it is noted that petitioners, who point to no authority which would compel the Board to provide them with such transcripts, at all times bore the burden of proof in their action before the Commissioner, irrespective of the Board's alleged improprieties.

Notwithstanding the above, however, the Commissioner notes that the record demonstrates that the Board, in applying its policy to A.G., perfunctorily turned to "the ultimate sanction of expulsion from the district" *C.S. v. Township of Piscataway*, 97 *N.J.A.R.* 573, *aff'd* State Board April 1, 1998, slip op. at 5, although its policy, as noted *supra*, did not *require* expulsion for a second offense of this kind, despite its mandate to conduct an expulsion *hearing.*[11] That hearing was petitioners' chance to make a case for A.G.'s continued enrollment in the district, while also allowing the Board the opportunity to fully consider A.G.'s circumstances and other options short of the ultimate sanction of expulsion. The Commissioner is particularly concerned that, notwithstanding the fundamental nature of an expulsion hearing, not only were petitioners dissuaded from attending the hearing and arguing on A.G.'s behalf, but there are also indications in the record that the Board may have deliberately failed to consider the viability of options other than expulsion, such as alternative educational programs, that might be suitable for him. (See Exhibit P-1, tape recording of Assistant Principal Spector's comments to

[10] The Commissioner notes that he, too, reviewed the tape produced by petitioners of their conversation with Mr. Spector on March 6, 2000 wherein they discussed various options for A.G. prior to the expulsion hearing.

[11] A memorandum dated March 1, 2000 from the Executive Vice Principal to Dr. Robert Kern, Superintendent, affirms, "Per Board of Education policy, on a second offense for testing positive, I am recommending that this student be expelled from Washington Township High School, pending Board of Education approval. If approved, my recommendation for [A.]'s educational program is that home instruction be provided until June 30, 2000 with

A.G.'s parents, prior to the expulsion hearing, in response to their inquiries about what would happen at the hearing and various educational options for their son, including alternative programs.[12]) Thus, while the Commissioner is fully cognizant of his limited standard of review, *Thomas, supra, Kopera, supra,* he finds that, under these circumstances, the Board's decision to expel A.G. may not have been the result of sufficiently full deliberation, so as to warrant the extreme result of terminating his entitlement to a free public education in the district.

Accordingly, the Initial Decision of the ALJ is affirmed in part, and reversed in part, for the reasons expressed herein. The Board is directed to readmit A.G. to its District and to determine, after considering pertinent factors, including available alternative educational options, whether expulsion is the appropriate result under all the circumstances of A.G.'s case.

The Commissioner does not retain jurisdiction.

IT IS SO ORDERED.[13]

COMMISSIONER OF EDUCATION

Date of Decision: November 6, 2000

Date of Mailing: November 6, 2000

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expulsion becoming effective after his 16th birthday. Additionally, [A.] will not participate in any school activities for the remainder of the school year." (Exhibit R-3)

[12] In this regard, the Commissioner notes that alternative education programs "are specifically designed to serve the dual purposes of removing the disruptive student from the regular education program, thus, permitting the district to maintain an educational climate that is both safe and conducive to learning, and assisting the alternative education student to continue [his] educational program in a public school setting, satisfy credit-year curriculum requirements and develop more responsible patterns of behavior." *C.S. v. Township of Piscataway*, *supra* at 577

[13] 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.