

#113-11 (OAL Decision: Not yet available online)

K.Q. and L.Q., on behalf of minor child, :  
C.Q., :  
 :  
 PETITIONERS, :  
 :  
 V. : COMMISSIONER OF EDUCATION  
 :  
 BOARD OF EDUCATION OF THE : DECISION  
 GATEWAY REGIONAL HIGH SCHOOL :  
 DISTRICT, GLOUCESTER COUNTY, :  
 :  
 RESPONDENT. :  
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SYNOPSIS

Petitioners alleged that the failure of the respondent Board to comply with State regulations and its own policy governing random drug testing rendered its actions arbitrary and capricious, such that the record of C.Q.'s drug test results should be expunged. The Board contends that: the drug test result is not part of the student's record; the policy – Board Policy No. 5536, Pupil Athletics and Extracurricular Activities Drug Policy – is sufficiently legal; and that ignoring the test results is contrary to the public policy goal of deterring students from using drugs and alcohol.

The ALJ found, *inter alia*, that: the respondent's drug policy did not comply with either *N.J.S.A.18A:40A-24(d)* or *N.J.A.C. 6A:16-4.4*, as it falls short of requirements for describing the procedures involved in randomly selecting students for alcohol and drug testing, and also fails to fully comply with the requirement that procedures for challenging the test results be included in school drug testing policies; the Board's failure to alter its policy in the wake of the enactment of *N.J.S.A.18A:11-1* resulted in the enforcement of a policy that no longer complies with State law; and the Board's action was therefore arbitrary, capricious and unreasonable. The ALJ concluded that C.Q.'s drug testing results must be expunged.

Upon consideration and review, the Commissioner found, *inter alia*, that: respondent's drug policy did not violate *N.J.S.A. 18A:40A-24(d)*, as it does contain a mechanism for challenging a positive test result; the Board did not act in an arbitrary, capricious or unreasonable manner in imposing discipline upon C.Q. for failing the random drug test, as petitioners were aware of the drug testing policy, did not challenge the method by which C.Q. was randomly selected, and stipulated at hearing that C.Q. had failed the drug test; and the drug test policy is a valuable method by which to identify students with drug problems and provide them with the support and resources they need. Accordingly, the Commissioner rejected the Initial Decision as to the finding that the drug policy violated *N.J.S.A. 18A:40A-24(d)*, and with regard to the ALJ's determination that C.Q.'s failed drug test should be expunged. Additionally, the Commissioner directed the Board to revise the drug policy to bring it into full compliance with the requirements of *N.J.A.C. 6A:16-4.4*.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 17, 2011

OAL DKT. NO. EDU 2469-10  
AGENCY DKT. NO. 38-3/10

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board of Education and the petitioners reply thereto.<sup>1</sup> This case involves Board Policy No. 5536, Pupil Athletics and Extracurricular Activities Drug Policy (drug policy). Pursuant to the drug policy, students who participate in extracurricular activities or receive an on-campus parking permit are subject to random drug testing. The Administrative Law Judge (ALJ) found that the policy did not comply with either *N.J.S.A.* 18A:40A-24(c)<sup>2</sup> or *N.J.A.C.* 6A:16-4.4, and as a result found that C.Q.'s positive drug test result should be expunged.

In its exceptions, the Board argues that there may have been nominal violations of *N.J.A.C.* 6A:16-4.4, but that the drug policy meets the overall spirit and public policy goal of legislation that encourages random drug testing. Further, the Board contends that the testimony presented at the hearing established that the actual procedures that were used to select and test

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<sup>1</sup> The record contains no transcripts from the hearing conducted at the OAL on January 18, 2011.

<sup>2</sup> The Initial Decision appears to mistakenly cite *N.J.S.A.* 18A:40A-24(c) as the applicable statutory provision. *N.J.S.A.* 18A:40A-24(d) is the provision stating that drug testing policies must include procedures for challenging positive test results.

C.Q. were in compliance with *N.J.A.C.* 6A:16-4.4. Additionally, the Board takes exception to the ALJ's holding that C.Q.'s failed drug test result should be expunged. The Board maintains that even if the drug policy does not completely comply with *N.J.A.C.* 6A:16-4.4, the remedy should be to bring the policy into compliance, not to expunge C.Q.'s drug test result. The Board points out that the petitioners did not challenge the accuracy of the test or the manner in which he was randomly selected, and they stipulated at the hearing that C.Q. failed the drug test. Finally, the Board argues that ignoring C.Q.'s positive drug test result is not in the best interest of C.Q. because he may not get the added support he may need should there be another offense.<sup>3</sup>

After consideration and review, the Commissioner finds that the drug policy did not violate *N.J.S.A.* 18A:40A-24(d) – which requires drug testing policies to contain a procedure for challenging positive drug test results – and, although the policy did not fully comply with the provisions outlined in *N.J.A.C.* 6A:16-4.4, the Board did not act in an arbitrary, capricious or unreasonable manner in imposing discipline upon C.Q. for failing the random drug test.<sup>4</sup>

The drug policy contains a provision that allows for pupil or parent/guardian grievances. The applicable provision states, “[a] pupil or parent/guardian who contests a positive test result on a random drug test may utilize the district’s internal grievance procedure as referenced in Policy 5710 and Bylaws 0133<sup>5</sup> in accordance with *N.J.S.A.* 18A:11-1.” Additionally, the drug policy states that a split urine sample will be taken for all tested students,

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<sup>3</sup> In reply the petitioners simply stated that they support all of the findings of the ALJ.

<sup>4</sup> In its exceptions, the Board erroneously suggests that the consequence imposed on the students for failing a drug test is not a form of discipline. Although participation in extracurricular activities is a privilege, and not a right, that does not negate the fact that a board’s decision to revoke a student’s ability to participate amounts to a form of discipline. *G.D.M. and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County*, Commissioner Decision No. 383-10, decided September 13, 2010. <http://www.state.nj.us/education/legal/commissioner/2010/sep/383-10.pdf>

<sup>5</sup> Policy 5710 and Bylaws 0133 were not part of the record, nor is there any information in the record indicating their content.

and if a student or parent/guardian chooses to challenge a positive result they have the option of sending the split sample to an approved testing facility. Therefore, the Commissioner finds that the drug policy was in compliance with *N.J.S.A.* 18A:40A-24(d) because it did contain a mechanism for challenging a positive test result. With respect to the provisions contained in *N.J.A.C.* 6A:16-4.4, the Commissioner is in accord with the ALJ's finding that the drug policy should have provided more information regarding the manner in which the eligible student information was generated and provided to the physician's office and the methods used to verify and document the random selection procedure.

Notwithstanding that the drug policy itself lacked certain regulatory details envisioned by *N.J.A.C.* 6A:16-4.4, the Commissioner cannot find that it has been demonstrated on this record that the Board's handling of this case was arbitrary, capricious or unreasonable, necessitating the expungement of C.Q.'s failed drug test. When a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Twp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966). Here, the petitioners were aware of the drug testing policy and that C.Q. would be subject to random testing;<sup>6</sup> the method by which C.Q. was randomly selected was not challenged by the petitioners; and the petitioners stipulated at the hearing that C.Q. failed the drug test. Moreover, the failed drug test result is not a part of C.Q.'s disciplinary record, and any potential ramification for C.Q. at this juncture will only be triggered if C.Q. fails another random

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<sup>6</sup> It is not stated in the record whether or not the petitioners signed a consent form before C.Q. signed up for extracurricular activities, but the drug policy states that parents must provide written consent to random testing prior to a student engaging in extracurricular activities.

drug test.<sup>7</sup> If C.Q. were to fail another random drug test, it would be considered a second infraction, resulting in a longer suspension from extracurricular activities and more substance awareness counseling and education. The drug policy is not simply a means to discipline students but also a valuable method by which to identify students with drug problems and provide them with the support and resources they may need. The overall intent of the drug testing legislation is to ensure the health and safety of students by recognizing and addressing the seriousness of substance abuse among school-aged children. An order expunging the failed drug test result in the absence of any evidence questioning the validity of the result or testing method would be putting form over substance, to the detriment of C.Q.'s well-being.

Accordingly, the recommended decision of the ALJ is rejected as to the finding that the drug policy violated *N.J.S.A.* 18A:40A-24(d), and with regard to the ALJ's determination that C.Q.'s failed drug test should be expunged. The Board is directed to revise the drug policy to bring it into full compliance with the requirements of *N.J.A.C.* 6A:16-4.4.

IT IS SO ORDERED.<sup>8</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2011

Date of Mailing: March 18, 2011

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<sup>7</sup> Results of any tests taken pursuant to the drug policy are destroyed after the student graduates.

<sup>8</sup> This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.