310-00

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH GRACEFFO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WAYNE, PASSAIC COUNTY.	:	
	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent vice principal for allegedly violating State law and Board Policy 5131.6 on six occasions regarding handling of students who were suspected of being under the influence of alcohol or drugs. The Board averred that under the plain language of the statute and the District's drug policy, a teacher's referral of a student as appearing to be under the influence of alcohol or drugs obligated respondent to drug test the student; respondent had no discretion in deciding whether to test. Respondent contended each test must be supported by reasonable suspicion. The Board sought respondent's dismissal from employment.

In light of testimony from witnesses presented during 15 days of hearing, numerous exhibits and post-hearing briefs, the ALJ concluded that the Board established by a preponderance of evidence that respondent violated the statute, *N.J.S.A.* 18A:40A-12, and the Board's policy in charges 1 and 2, the N.L. incident, in charges 3 and 4, the A.F. incident and the J.B. incident, but not in charges 3 and 4, the "rage" incident and the D.M. incident. With respect to penalty, although the Board demonstrated that from 1995 to 1999, respondent failed to properly implement the policy and law with three students, the Board did not discipline him until the death of N.L. In addition, respondent had consistently positive performance evaluations. Thus, the ALJ determined that the Board failed to establish that respondent's conduct constituted a pattern of unbecoming conduct sufficient to warrant his dismissal from employment. The ALJ ordered that respondent suffer a permanent reduction of one step on the salary guide and forfeit all salary and benefits that would otherwise have accrued during the first 120 days of his suspension.

The Commissioner adopted the ALJ's determinations in charges 1, 2, 3, and 4, except for charges 3 and 4 in the "rage" incident, and modified the ALJ's analysis and conclusions in certain respects. The Commissioner rejected the ALJ's conclusions in the "rage" incident and, unlike the ALJ, found respondent guilty of the charges in that incident. The Commissioner determined that, notwithstanding any concern respondent may have had as to whether the referral of the "rage" student was reasonable, respondent's obligation under the law was to arrange for an immediate medical examination of the student upon the staff member's persistence in her belief that the student exhibited indicators of possible substance abuse. The Commissioner clarified that, under *N.J.S.A.* 18A:40A-12, once a teaching staff member, school nurse or other educational personnel has reported, based upon observation and articulation of specific indicators, that a student may be under the influence of alcohol or other drugs, the principal or his designee *must* arrange for an *immediate medical examination* of that student. The Commissioner further stressed that drug testing is not a substitute for the required medical examination. Because there was clearly confusion in the District with respect to roles and responsibilities under the law and District policy, and because District policies were not entirely in conformance with statute and rule as interpreted by this decision, the Commissioner directed the Board to revise its policies and procedures, institute a continuing education program for staff in the identification of symptoms of substance abuse and the requirements imposed upon them by *N.J.S.A.* 18A:40A-12, and submit its revisions and plans in this regard to the County Superintendent for review and approval.

September 21, 2000

OAL DKT. NO. EDU 5619-99
AGENCY DKT NO. 113-5/99

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH GRACEFFO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WAYNE, PASSAIC COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions, respondent's exceptions, and the replies[1] thereto, were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

BOARD'S EXCEPTIONS

In its exceptions, the Board objects to the findings of the Administrative Law Judge (ALJ) with respect to the 1991 and 1994 incidents and to the ALJ's recommended penalty. The Board argues that the ALJ's conclusion with respect to the 1991 incident is contrary to her finding that an administrator's duties are mandatory upon receipt of a referral by a teaching staff member who reports that a student may be under the influence of alcohol or other drugs. The Board submits that the ALJ, therefore, erred when she determined that respondent did not violate Board policy or State law by refusing to test the "rage" student in 1991, and that, respondent's conduct in that incident did not amount to unbecoming conduct. (Board's Exceptions at 9, 11)

[1] Although the record in this matter closed on May 3, 2000 and the Initial Decision was issued on June 19, 2000, respondent's Reply Exceptions included a June 22, 2000 article from the *Bergen Record* and references in the brief thereto. The *Bergen Record* article was not presented at the hearing and not previously made a part of the record. Therefore, in accordance with *N.J.A.C.* 1:1-18.4(c), the article and incorporated references thereto were not considered by the Commissioner.

With respect to the 1994 incident, the Board avers that the ALJ's determination concluding that there was insufficient evidence that respondent neglected his drug-testing duties because: (1) the Board relied exclusively on the testimony of Victoria Musetti, the District's Student Assistance Specialist, and did not present any evidence from anyone else directly involved, and (2) Musetti had not mentioned the incident until the time of the hearing, are not sufficient bases for the ALJ's assessment that the Board did not meet its burden of proof. (*Id.* at 13-14) While acknowledging that Musetti's conversations with teacher Bob Bishop and school principal DeVries are hearsay, the Board argues that hearsay evidence is admissible provided it is supported by other competent evidence, which the Board avers is present in Musetti's conversations with respondent, which are not hearsay. *See N.J.R.E.* 803(b)(1). (*Id.* at 15) Additionally, the Board proffers that, even if all the testimony in the 1994 incident was based upon pure hearsay, it would still constitute credible evidence for the purpose of demonstrating a pattern of unbecoming conduct. (*Id*. at 16) With respect to the ALJ's second concern, the Board disputes that Musetti did not mention the 1994 incident until the hearing, submitting that the incident was mentioned by Musetti during the Board's initial investigation, was one of the bases for its decision to certify tenure charges, is described in Musetti's written statement, and the incident is contained in the tenure charges and was the subject of the interlocutory appeal before the Commissioner. (*Id*. at 17)

Further, the Board advances the argument that the ALJ erred when she found that respondent's multiple violations, in 1995, 1996 and twice in 1999, did not constitute a pattern of unprofessional and unbecoming conduct. (*Id.* at 19) Although the four incidents in 1995, 1996 and 1999 were the only charges the Board was able to document by the time it certified tenure charges, the Board contends that the testimony at hearing indicates that there were additional incidents which the Board asks the Commissioner to consider as additional evidence that

respondent engaged in a pattern of unprofessional and unbecoming conduct from 1991 through 1999. (*Id*. at 20-22)

With regard to penalty, the Board urges the Commissioner to reject the ALJ's conclusion that respondent's conduct was just "poor judgment," which, in light of his unblemished record, warrants a lesser penalty than dismissal. Rather, the Board posits that the Commissioner should take into account the seriousness of respondent's conduct and the consequences of that conduct, and conclude that dismissal is the appropriate penalty. (*Id*. at 29-30) The Board further argues that, despite in-service training, respondent has shown a propensity for continually exercising discretion as to whether to chemically screen students referred to him for suspected drug and alcohol use in contravention of State law and Board policy and, thus, is likely to continue such conduct, putting the school community at risk, if he is permitted to continue in his position. (Id. at 33-35)

RESPONDENT'S EXCEPTIONS

In his exceptions, respondent argues that he has maintained from the outset that:

> *N.J.S.A.* 18A:40A-12 *** must be read in conjunction with the companion statute, *N.J.S.A.* 18A:40A-11, and the corresponding administrative code section, *N.J.A.C.* 6:29-6.3, all of which our (sic) grounded on the concept of "*reasonable suspicion*". That this is the standard on which all drug tests are to be based, including those sanctioned by *N.J.S.A.* 18A:40A-12, and that *N.J.S.A.* 18A:40A-11 expressly states that "significant symptoms["] must be present to trigger the examination and treatment provisions in the statute, only underscores that the role of the principal or the designee is not as a passive bystander as the Board would have it, but as an active participant to ensure, as the Court said with regard to the 1991 incident, that the symptoms reported are sufficient to warrant testing and in addition, to ensure that the obligations of the Board are followed and the rights of the student are protected. (emphasis in text) (Respondent's Exceptions at 2-3)

With respect to the 1999 N.L. incident, respondent submits that the referring teacher did not request that he chemically screen N.L., so that the procedure in place was to

evaluate the student to corroborate the smell of marijuana to satisfy whether there was reasonable suspicion to test the student. Respondent submits that the Court's application of the statute in N.L. is inconsistent with the reasonable suspicion provision, arguing that the ALJ's finding in the N.L. incident can only be justified by the interpretation that a test must occur "*automatically*" upon a teacher's referral, thus rendering the role of a principal or designee to that of a passive bystander who cannot investigate or corroborate what occurred. (*Id.* at 4-5)

Additionally, respondent asserts that the ALJ erred in concluding that because respondent violated *N.J.S.A.* 18A:40A-12 that he had exhibited conduct unbecoming. Respondent avers that a violation of statute in and of itself does not constitute conduct unbecoming. To conclude that respondent is guilty of conduct unbecoming, respondent argues, there must be a finding that respondent deliberately disregarded the law and his obligations under the law, which did not occur in this instance, wherein the ALJ found respondent to have exhibited "poor judgment" in three incidents in the course of 34 years as an educator. There is nothing in case law, respondent maintains, that suggests that conduct unbecoming can be based on mere negligence, particularly in a situation such as herein where respondent's own immediate supervisors did not fault him for the actions he took. (*Id*. at 6) Respondent raises the question, that if other seasoned educators agreed with respondent's actions and if there was confusion as to when and how the policy and statute were to be triggered, as is evidenced in the testimony, then how can respondent's "poor judgment" somehow be raised to the level of conduct unbecoming. (*Id*. at 7)

Respondent asserts that Nurses Nancy Przetak and Marilyn DeStefano, Vice Principal Bob Santangelo, Core Team Members Susan Ammerman and Linda Remolino, and Principals Robert Reis and Russell DeVries testified that their understanding of the District's implementation of the Board's Policy 5131.6 and the statute was consistent with respondent's understanding; that is, if a teacher in the District requests a drug test, then the student is tested.

However, if a teacher reports that a students smells of alcohol or marijuana, without a request to test, the practice up to January 1999, was to leave it up to the nurse and administrator to determine whether a smell exists and whether anything further is required. (*Id*. at 10-11) In support of his contention that this was the practice, respondent points to a November 6, 1996 memo from Vicky Musetti and the Core Team to all staff which states *"we would like to remind you that you must be clear in your request that a student is to be tested … it would be better to state your concern and be clear that you are requesting the drug policy be invoked."* (emphasis in text) (*Id*. at 16) Although the ALJ determined that "******communication to Mr. Graceffo was sufficient to trigger the mandatory testing requirement of the statute,*" respondent submits that the current principal of Wayne Valley High School, Mr. Reis, testified that if he receives a report that a student may smell of marijuana, "*you can certainly make a call for a test, but everything that I have been taught, previously policies, state assessment for Core Teams, everything I have been taught says that I have to have some suspicion, something stronger than just a smell. So, I would go after that. I would bring people in. I would have them look at the kid, talk to the kid. I would be smelling that kid like crazy. I would have the nurse take a look at his vitals. I don't know whether I would necessarily test."* (emphasis in text) (*Id.* at 25) Respondent avers that he, therefore, acted consistent with the District's practice since the referring teacher in the 1999 N.L. incident, Ms. Ammerman, only informed him that N.L. smelled of marijuana; she did not request a test. (*Id.* at 15)

Respondent also disputes the Board's claim that he was provided training with regard to the Board's Drug and Alcohol Policy or the State statute, stating that there was no organized training provided, a fact confirmed by fellow Vice Principal Santangelo, who testified that there was no training for administrators at Wayne Hills High School, and Nurse Przetak, who testified that the policy was only touched upon the day before school started. (*Id*. at 12)

At page 28 of the Initial Decision, the ALJ states that the evidence shows that from 1994 to 1999 Wayne Valley High School conducted approximately 189 drug tests, and that during the same period Wayne Hills High School conducted 184 tests. Respondent submits that these statistics were taken from an early report before the figures were revised and are, therefore, incorrect. Since the rigorousness of the enforcement of the school's Drug and Alcohol Policy at the school where respondent was assigned has some relevance, respondent maintains that it is important to correct the statistics embodied in the Initial Decision. According to the revised statistics presented to the Court in Exhibit R30, respondent maintains, from 1994 to 1999 Wayne Valley High School, where respondent was assigned, had an overall total of 193 drug and alcohol tests administered as compared to a total of 88 tests, 26 of which were administered after the N.L. incident, during the same period at Wayne Hills High School.[2] The number of tests administered at Wayne Valley High School, therefore, far exceeds those administered at the District's other high school. This, respondent argues, demonstrates that the administration at Wayne Valley High School, of which respondent was a part, was not lax in implementing the Board's Drug and Alcohol Policy. (*Id*. at 12-14)

With respect to the January 21, 1999 N.L. incident, respondent posits that he did what any other administrator in the District would have done at the time under similar circumstances. When Ms. Ammerman indicated to him that she smelled marijuana, he took N.L. to the nurse to be evaluated. Absent a request from the teacher to test, and absent a confirmation of smell by respondent, or Nurses DeStefano or Cordo, and Ms. DeStefano's statement that she found everything to be normal, respondent followed the practice in the District not to test. (*Id*. at 16-17) He did, however, call the parents to advise them of the situation. Further, although Ms. Ammerman apparently mentioned a request to test to the two nurses, both Ms. DeStefano

[2] Respondent provides a breakdown of the drug and alcohol screening tests performed at Wayne Valley High School as 137 tests performed in school and 56 tests administered privately. Wayne Hills High School reportedly had 83 tests performed in school and 5 tests conducted privately.

and Ms. Cordo testified that they did not tell respondent that Ms. Ammerman had requested a drug test. (*Id*. at 17) Respondent also disputes the ALJ's statement in the Initial Decision that Ms. Ammerman "*testified that she asked Mr. Graceffo to test N.L.*" Respondent argues that Ms. Ammerman actually testified that she reported to respondent as follows, "*to the best of my knowledge, that I smelled marijuana and I have a good nose.*" (emphasis in text) (*Id.* at 18) Further, although Ms. Ammerman testified that she had reported that N.L.'s pupils were dilated to Ms. Cordo, Ms. DeStefano, Mr. Graceffo, Mr. Flower, Chairperson for the Department of Art, Music and Physical Education, and Mr. Modica, respondent maintains that not one of the individuals to whom Ms. Ammerman allegedly reported the symptoms of dilated pupils recalled her making such a statement, and Ms. Ammerman acknowledged that she did not tell the Core Team that N.L.'s pupils were dilated when she met with them on February 4, 1999. (*Id*. at 18-20)

Respondent excepts to the ALJ's statement that Mr. Flower told respondent that he too "*suspected drug use by N.L.*," and that Mr. Flower suspected that N.L. "*might be under the influence.*" Respondent submits that Mr. Flower testified that he had told respondent that he smelled an odor on N.L. that he suspected might be of marijuana and that Ms. Ammerman had asked him to come over and let him know. (emphasis in text) (*Id*. at 20-22) Respondent also states he thought Mr. Flower was referring to Ms. Ammerman's incident the previous day when Mr. Flower told him that he thought he smelled marijuana on N.L. Respondent contends that his response to Mr. Flower, that he had taken care of the matter the previous day and had spoken to N.L.'s mother, substantiates that he thought they were talking about events of the previous day. (*Id*. at 43)

Respondent contends that the motivation of the Board and Ms. Musetti is about whom to blame for N.L.'s overdose on February 6, 1999. (*Id*. at 31) In support of this contention, respondent points to the testimony of the former principal of Wayne Valley High

School, Mr. DeVries, who stated that he believed the superintendent hated respondent, and to Ms. Tierney's testimony that Ms. Musetti told her that she was "*keeping a file on Graceffo and that one day she would get him.*" (emphasis in text) (*Id.* at 30-31) Respondent submits that Ms. Musetti's testimony was a work in progress with respect to the 1994 D.M. matter as her testimony had no resemblance to her prior statement. Respondent also faults the Board in this regard for choosing to rely solely on Ms. Musetti's testimony in the D.M. incident, rather than utilizing Mr. Bishop to testify, when it readily had him available and he was allegedly the individual directly involved in the incident. (*Id*. at 31)

In the 1996 J.B. incident, respondent points out that because he did not act to test J.B. between 7:30 a.m. and noon the same day, November 6, 1996, the ALJ found that respondent exhibited conduct that was unprofessional and unbecoming. (*Id*. at 33) Respondent counters that the evidence shows that, as his principal testified, the real concern here had to do with what occurred on November 5, 1996, before respondent was brought into the picture. (*Id*. at 36) According to Ms. Musetti, J.B. had twice tested positive for drugs. Yet, despite this knowledge, following an observation on November 5 by referring teacher, Ms. Curasco, that J.B. may have been under the influence, Ms. Musetti, and perhaps Vice Principal Tierney, as well, allowed J.B. to go home unattended and unsupervised, contrary to policy, without informing his parents. (*Id*. at 33) Respondent, therefore, finds no logic to the ALJ's conclusion that respondent's conduct on November 6 was unbecoming and unprofessional in view of the silence regarding the other participants' conduct of the matter the previous day. (*Id*. at 36)

In light of the fact that no one was found at fault in allowing J.B. to go home unsupervised and without parental notification, respondent disputes the ALJ's conclusion that his conduct was unprofessional and unbecoming by his handling of a similar incident in 1995. In the 1995 A.F. incident, respondent notified A.F.'s mother of the referral, and kept A.F. in his office for the remainder of the day since the student's mother was unable to come to the school

until the next day to sign the paperwork for A.F. to be tested. (*Id*. at 37-38) Respondent argues that neither the statute nor the policy requires that the examination take place within 24 hours, rather both state that the examination shall take place "*as soon as possible*." (*Id.* at 44)

Respondent further argues that his understanding of the policy and the statute is that: 1) if a teacher requests a test, then the student must be tested; 2) a teacher must provide him with symptoms because he needs to explain to the parent and to the student why the drug policy has been invoked; and 3) that a drug test must be based on reasonable suspicion--discernable factors observed by the person making the referral and requesting the test. (*Id*. at 38)

Citing *Hedges v. Musco,* 33 *Fed. Supp.* 2nd 369, 378 (1999 U.S.D.C.N.J.) and *N.J.S.A.* 18A:40A-11, respondent maintains that students are to be referred to treatment only when they show significant symptoms of the use of drugs or alcohol. Respondent posits that the ALJ seems to say that the principal or principal designee may not try to discern whether the symptoms observed warrant testing, which is opposite to her findings with regard to the 1991 incident. (*Id*. at 39, 40) Arguing that the Board's position that the mere smell of marijuana, even if uncorroborated and without a request to test, must be tested, is not the understanding of the administrators charged with implementation of the policy. Respondent claims that both Mr. Reis and Mr. DeVries testified that they would investigate, and the other vice principal, Mr. Santangelo, testified that in investigating an incident with another student a week prior to the N.L. incident:

> *We concluded there was no reason to test. There was no smell. There was no behavior which indicated any kind of use. All the vitals checked out. So when the mother came in, I informed her there was no need for the test and we didn't test****. (emphasis in text) (*Id*. at 42, citing Tr. 2/29/00 at 13)

Respondent also avers that Mr. Santangelo did not test another student who was referred to him by the principal who thought he smelled marijuana around the student. (*Id*. at 42)

BOARD'S REPLY EXCEPTIONS

In its reply exceptions, the Board counters, *inter alia*, that respondent was well aware of his legal obligations in administering the Drug and Alcohol Policy under the statutes and school policy. Alleging that respondent was aware of his obligations, but chose to exercise discretion on referrals, the Board cites failed attempts by Ms. Musetti and Mr. Tucker, former President of the Wayne Education Association, to persuade respondent that he did not have discretion on the issue of testing students referred for suspected drug use. (Board's Reply Exceptions at 3, 4) Citing to testimony provided by the Board's witnesses on how the drug testing provisions are triggered in the District, the Board further submits that respondent's claim that there was a practice in the District which was different from the letter of the policy and statute has no merit. (*Id*. at 5) As to respondent's claim that he was not properly in-serviced, the Board underscores that respondent admitted attending a three-day Core Team training workshop. The Board points out that the trainer, Mary Donovan, testified that she clearly instructs attendees in her workshops that there is no discretion once a student has been referred. The Board contends that respondent also attended an in-service on this issue for teachers. (*Id*. at 9)

The Board stresses that the ALJ found Ms. Ammerman's testimony credible; and, thus, her testimony should be credited both with regard to her statement that she told respondent N.L.'s eyes were dilated, and that she specifically requested a test. (*Id.* at 14-16) The Board argues that even assuming, *arguendo*, that Ms. Ammerman did not mention dilated eyes to respondent or request a test to him in the N.L. matter, it was clear that she was making a referral. The drug test should, therefore, have been automatic as neither the statute nor the policy provides for administrator's discretion once a referral has been made. (*Id*. at 12, 13) Further, even if one assumes that respondent truly believed that Ms. Ammerman's suspicion had to be corroborated as respondent has argued, the Board submits that Ms. Ammerman's suspicion was, in fact,

corroborated by Mr. Flower's referral, especially if respondent really believed Mr. Flower was talking about the same day as respondent claims. (*Id.* at 18)

Additionally, the Board asks the Commissioner to discount the testimony of respondent's witnesses, Mr. Reis, Mr. DeVries and Ms. Przetak. The Board claims that: 1) respondent and Mr. Reis are close friends and his testimony is inconsistent with his deposition; 2) Mr. DeVries' testimony is vague, he was unable to recall anything relevant to the matter, and Mr. DeVries was discredited because he had been cited in his own evaluations for failing to enforce the smoking provisions of the same policy; and 3) Ms. Przetak vacations with respondent and his family. (*Id.* at 23, 24) Despite these affiliations with respondent, the Board asserts that all three testified that respondent had violated statute and policy by not testing the "rage" student in 1991. (*Id.* at 24) Further, the Board contends that respondent misrepresented his fellow Vice Principal Mr. Santagelo's testimony, as Mr. Santangelo testified that there is no discretion under the policy and that neither policy nor statute requires a specific request for a test. (*Id*.) Further, the Board explains, when faced with a similar issue, that is, a report based upon nothing more than the odor of marijuana, Santangelo contacted the student's parent and arranged for the student to be immediately tested. (*Id.* at 26)

The Board objects to respondent's criticism of the handling of the J.B. incident by Ms. Musettti and Ms. Tierney. The Board asserts that nothing could have been done by either Ms. Musetti nor Ms. Tierney before J.B. left the building because Ms. Curasco did not invoke the policy until school had been dismissed and the student had left. Ms. Tierney could have called J.B.'s parents, but it was not within Ms. Musetti's authority to make the notification call. The Board further claims that it has never taken the position that respondent was the only one at fault in this incident, and had the Board uncovered evidence that these individuals unknowingly neglected their obligations, and that they had done so on other occasions repeatedly, tenure charges would have been proffered against them, as well. (*Id*. at 32) The Board criticizes

respondent, however, for exercising absolutely no supervision over J.B. once Ms. Tierney requested that he test the student, whom the Board characterizes as a known drug user. The Board takes issue with the fact that respondent did have responsibility for J.B. for five hours without testing, even though J.B. had a voluntary urine screening form on file and could have been tested without the delay of obtaining parental consent. (*Id*. at 34)

With respect to the A.F. incident, the Board proffers that even if respondent kept A.F. in his office while awaiting the drug test, A.F. was a known drug user and the delay in testing could have put her at medical risk, or at least affected the accuracy of the test. (*Id.* at 34-36)

The Board repeats its arguments that an administrator has no discretion once a teaching member makes a referral and asserts that the discretion as to whether significant symptoms exist rests with the referring staff member. (*Id.* at 40)

Finally, the Board argues that respondent's conduct was deliberate and directly reflects on his fitness to serve as an administrator. The Board asserts that as early as 1991, Ms. Musetti informed respondent that he had an obligation to immediately drug test students referred to him and that this obligation was reinforced by complaints by Musetti and the Core Team in 1994 (D.M.), 1995 (A.F.) and 1996 (J.B.). The Board also submits respondent was approached by Mr. Tierney in 1993, Mr. DeVries in 1995, Mr. Reis in 1996 and Mr. Tucker in 1997, all of whom instructed him that he had no discretion on the issue of drug testing. (*Id*. at 43)

RESPONDENT'S REPLY EXCEPTIONS

In his reply exceptions, respondent repeats his arguments that a principal or his designee has the responsibility to investigate a referral by making an assessment, together with the nurse, in order to satisfy whether there are "significant symptoms" as specified in

N.J.S.A. 18A:40A-11 and "reasonable grounds" required by *N.J.A.C.* 6:29-6.3 for drug testing, which respondent contends, is a search. (Respondent's Reply Exceptions at 2-5) Respondent submits that in 1986 at hearings before the Senate Education Committee, Philip Brown, then statewide coordinator for drug and alcohol education, stated that the Department of Education was "*putting forth guidelines…which will give some specific parameters, in the kinds of things you are asking for, for school districts to use.*" However, no guidelines were issued. (emphasis in text) (*Id*. at 3-4)

In regard to the Board's contention that every student referred must result in a drug test, respondent points out that:

> *N.J.S.A.* 18A:40A-12 *** does not talk about drug testing. It speaks to the need of having the student examined by a physician. The statute states in relevant part that the principal or his designee "*shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an immediate examination of the pupil by a doctor…*" While the Board seeks to apply a literal interpretation to the rest of the statute, it has a more flexible view of the statute's "*examination by a doctor*" requirement. Under the Board's interpretation having a drug test conducted by a lab satisfies the examination by a doctor requirement. (emphasis in text) (*Id.* at 2-3)

With regard to the 1991 "rage" incident, respondent asserts that the ALJ correctly determined that respondent was in a better position to assess whether the "rage" was drug related because he had met with the student and there may have been a logical explanation for the student's anger. (*Id*. at 4) Respondent avers that the Board's view that whether there is reasonable suspicion for the drug test of a student should be made by the referring teacher, not by the administrator, is neither sensible nor reasonable, as concluded by the ALJ, given the facts in the 1991 incident. In the Board's view, respondent argues, Ms. Musetti's referral based solely on her observation of an angry student leaving respondent's office, the student in the 1991 incident should have been tested, notwithstanding the fact that respondent was the one with the student, knew why he was angry, and knew what had transpired in his office. (*Id*. at 6)

Further, respondent objects to the Board's contention that alleged undocumented and unsubstantiated incidents related by some of the witnesses and not certified in the tenure charges should have been considered by the ALJ to establish a pattern of behavior. Respondent asserts that this is contrary to due process and fair play and to the process established in *N.J.S.A.* 18A:6-11. (*Id.* at 11)

With respect to the 1995 A.F. incident, respondent submits that he notified A.F.'s mother immediately upon her referral, but A.F.'s mother said she couldn't come in to pick her daughter up or sign any forms that day; she would take care of it the next day. A.F. spent the balance of the day in respondent's office. The following day, A.F. did not come into school until the afternoon when she came in with her mother. (*Id.* at 13) Respondent further avers that all the witnesses had testified that no student had been referred to the medical inspector. "This was not the way it was done in Wayne." (*Id*. at 14) Respondent notes that the policy in effect at that time was silent as to a situation where the parent is contacted but is unable to come into school that day. Therefore, respondent contends that he cannot be held to have violated the policy since it did not cover the facts of this particular incident. (*Id*. at 14) Respondent also takes exception that A.F. was a known drug user since her records were not introduced and the only context for classifying her as such were comments made by Ms. Remolino. (*Id*. at 15) Respondent also notes that neither his supervisor nor the Board faulted him at the time for his handling of the A.F. matter. (*Id*. at 16)

With respect to the 1996 J.B. incident, respondent repeats the arguments advanced in his exceptions. He also points out that his supervisor at the time was concerned with the fact that Ms. Musetti and the other people involved failed to notify J.B.'s parents to alert them as to what had occurred, but did not have any concern regarding respondent's actions in the matter. In retrospect, respondent suggests, the Board now maintains that his conduct was

so egregious and so violative of the law as to require a finding that respondent is guilty of unbecoming conduct and dismissal from its employ. (*Id*. at 18)

Citing extensively to the transcripts, respondent repeats the argument advanced in his exceptions and briefs that other professional staff members would have made a similar decision regarding the testing of N.L. given a similar situation.

Respondent disputes the Board's contention that he was told over and over by a number of staff members that he did not have discretion under the policy and statute. Respondent states that the only complaints he ever received were from Ms. Musetti. (*Id*. at 25) In rebuttal to the Board's arguments, respondent points to Mr. DeVries' testimony that respondent's actions complied with the policy, and Mr. Reis' testimony in regard to the 1996 J.B. incident in which he stated that "*I did not have a concern for what he did*." (emphasis in text) (*Id.* at 24 citing Tr. 1/31/00 at 96) Further, respondent asserts that Mr. DeVries denied having received any complaints from Mr. Tucker or Ms. Remolino, or anyone else except Ms. Musetti. (*Id*. at 25 citing Tr. 1/11/00 at 82)

Respondent also disputes the Board's information concerning his training in the requirements of the policy and statute. Respondent denies attending in-service training on the Drug and Alcohol Policy, admits that he attended a workshop pertaining to Core Team training in 1992, but denies that the training was conducted by Ms. Donovan. Respondent notes that his training occurred two or three years before Ms. Donovan began training, since Ms. Donovan testified that she had only been training for five or six years. (*Id*. at 25)

Citing *Princeton Regional School District v. Campbell Board of Education*, 93 *N.J.A.R.*2d (EDU) 196 (1993); *Flemington-Raritan Regional School District v. VanGilson*, 93 *N.J.A.R.*2d (EDU) 378 (1998); *In the Matter of the Tenure Hearing of Charles Talley*, 94 *N.J.A.R.*2d (EDU) 395 (1994); *Morris School District Board of Education v. Brady*, 92 *N.J.A.R.*2d (EDU) 410 (1992); *In the Matter of the Tenure Hearing of Jacques L. Sammons*,

1972 *S.L.D.* 302; and *In the Matter of the Tenure Hearing of Eileen Johnston*, 95 *N.J.A.R.*2d (EDU) 439 (1995), respondent submits that in cases which resulted in a finding of conduct unbecoming, the conduct spoke of deliberate misconduct. (*Id.* at 26-28) Respondent proffers that:

> No cases have been found in which the Commissioner has determined that a teaching staff member has exhibited conduct unbecoming based on an alleged violation of statute or rule or policy, where the violation alleged is by no means certain or clear on its face, and where the evidence does not support a deliberate violation. (*Id.* at 28)

Finally, respondent urges the Commissioner to consider his glowing evaluations and his many years of unblemished service in education. Respondent points to the fact that both Ms. Ammerman and Ms. Remolino, who were witnesses for the Board, as well as virtually all the staff of Wayne Hills High School, signed a petition supporting him in this matter (*Id.* at 30-31) Respondent also points out that Mr. Tucker, a Board witness, testified that respondent was a very good vice principal, that his former principal, Mr. Reis, testified that respondent was the best vice principal he had ever worked with, and that another former principal, Mr. DeVries, wrote in his final evaluation that respondent was ready to serve as a high school principal. (*Id.* at 31, 32)

COMMISSIONER'S DETERMINATION

Upon an exhaustive review of the record, including transcripts of the 15 days of hearings, evidentiary documents and arguments advanced by the parties, the Commissioner determines to modify the conclusions of the ALJ for the reasons that follow.

At the very outset, the Commissioner stresses that the operative statute herein, *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.* As stated by the ALJ, "[t]he legislative intent behind the statute reflects a "zero-tolerance" attitude towards drug abuse and the statutory language leaves little room for interpretation." (Initial Decision at 13) 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] The relevant portion of the statute reads as follows:

> Whenever it shall appear to any teaching staff member, school nurse, or other educational personnel of any public school in this State that a pupil may be under the influence of substances as defined pursuant to section 2 [18A:40A-9] of this act, other than anabolic steroids, that teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be, or to a substance awareness coordinator, and to the principal or, in his absence, to his designee. *The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian, or if that doctor is not immediately available, by the medical inspector, 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.* (emphasis added) (*N.J.S.A.* 18A:40A-12)

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

[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.

information to parents and medical providers when they are contacted as required by law.[4] Neither is there anything suggesting that the staff member must specifically request that the student be chemically screened or otherwise examined before the required medical examination is arranged. 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.

Since a mandatory medical examination is triggered upon report by a staff member to whom it appears that a student is under the influence of alcohol or drugs, it is essential that a district board provide the training necessary to enable appropriate district employees to be aware of, and equipped to fulfill, their responsibilities under the statute. In this regard, the district board is responsible for the training of all teaching staff members, school nurses and all other educational personnel so that they are thoroughly familiar with the symptoms and indicators of substance abuse. *See N.J.S.A.* 18A:40A-15(b). Such training is vital, so that symptoms of substance abuse can be readily identified, especially by those staff members most likely to be in the position to observe students directly. In this context, it must be emphasized that a staff member need not be certain that a student *is* under the influence of alcohol or drugs, but need only have made a reasonable judgment, based upon symptoms and indicators he or she has observed in the student and articulated to the designated administrator, that the student *appears* to be under such influence. Any staff member who refers a student pursuant to *N.J.S.A.* 18A:40A-12 *in good faith, provided that the skill and care given is that ordinarily required and exercised by other such staff members,* is held harmless for that action. *See N.J.S.A* 18A:40A-13 and *N.J.S.A* 18A:40A-14.

[4] The Commissioner notes that Board policy expands on the statutory directive for notification by also requiring the principal to "***verbally explain to the student's parent/guardian what the symptoms were that led to the reporting***." (Policy 5131.6)

Review of the Board's Drugs, Alcohol and Tobacco Policy 5131.6 reveals that the policy largely reflects, or is consistent with, the language of *N.J.S.A.* 18A:40A-12, except that the policy provides for the medical inspector to appoint a designee. The Board's current policy in pertinent part reads as follows:

> "If the school authorities are unable to contact the parent/guardian and/or if the doctor selected is not immediately available, the school medical inspector *or designee*[5] shall be immediately called upon to examine the pupil for the purpose of diagnosing whether or not the pupil is under the influence of alcohol or drugs pursuant to *N.J.S.A.* 18A:40A-12.

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. Although it would be permissible to interpret the Board's policy to permit the medical inspector to designate another physician so licensed to serve in his stead if he were not available, he may *not* designate any person *not* so licensed, including the school nurse. However, the testimony of *all* witnesses, currently or previously under the Board's employ, suggests that the medical inspector is never a part of the process in this District. The Board has apparently interpreted "or designee" to permit examination by the school nurse, followed by in-house collection of a sample of the student's urine that is evaluated by an outside laboratory, as satisfaction of the requirement that a pupil be examined by "the school medical inspector or his designee." (Tr. 10/4/99 at 50, 55; Tr. 12/7/99 at 25, 38, 129-131; Tr. 12/9/99 at 103 and Tr. 1/31/00 at 28) As stated above, the school nurse is not authorized to conduct the medical examination required by *N.J.S.A.* 18A:40A-12 to determine whether a student is under the influence of alcohol or drugs.[6] The Commissioner reiterates that under the mandated reporting, notification and examination procedures in

[5] Although the Board's Policy 5131.6 has undergone several revisions, this provision has remained the same throughout the policy revisions provided in the record.

[6] As the testimony of one of the District's school nurses suggests, when a student is reported as being under the influence of alcohol or drugs, the function of the school nurse is to make a clinical assessment of the student's vital signs to determine whether the student requires immediate intervention pending further medical assessment. (Tr. 10/25/99 at 77-99)

N.J.S.A. 18A:40A-12, schools must arrange an immediate *medical examination* for students reported as appearing to be under the influence of alcohol or drugs in school or at school-sponsored events. A physician selected by the parent or guardian, the school's medical inspector or the emergency room of the nearest hospital *must* conduct the examination and diagnose whether or not the student is under such influence. *N.J.S.A.* 18A:40A-12 and *N.J.A.C.* 6:29-6.5 are silent on the issue of student drug screening. Clearly, there is no basis in law for substituting such screening for the *required medical examination* of students who are reported as appearing to be under the influence of alcoholic beverages or other drugs. The Commissioner thus concludes that the Board's interpretation of its obligations under the law is erroneous and is not in compliance with the relevant statute, regulation or its own policy.[7]

Tenure Charges No. 1 and No. 2[8]

The ALJ concluded that respondent exhibited unprofessional and unbecoming conduct by his violation of *N.J.S.A.* 18A:40A-12 and the Board's Drug, Alcohol and Tobacco Policy 5131.6 when he decided not to "test" N.L. upon receiving reports from Ms. Ammerman and Mr. Flower that N.L. appeared to be under the influence of marijuana.

The Commissioner's review of the evidence supports the ALJ's conclusion that both Ms. Ammerman and Mr. Flower communicated to respondent that they detected an odor of marijuana on N.L. Further, when respondent informed Ms. Ammerman that N.L. was not going to be tested, Ms. Ammerman restated her belief that N.L. smelled of marijuana. Although the parties dispute whether Ms. Ammerman said "reeked of marijuana" or "smelled of marijuana," whether Ms. Ammerman told respondent N.L.'s pupils were dilated, and whether a drug test was specifically requested, it is undisputed that Ms. Ammerman and Mr. Flower articulated their

[7] The Commissioner notes that there is no testimony to confirm compliance with the provision that the Superintendent of Schools must be notified whenever a student is referred as appearing to be under the influence of alcohol or other drugs.

[8] Tenure Charge No. 1 addresses violation of the statute, *N.J.S.A.* 18A:40A-12, and Tenure Charge No. 2 addresses the Board's Drug, Alcohol and Tobacco Policy 5131.6. Since the policy essentially reflects the language of the statute, these charges are being considered simultaneously.

belief that N.L. "smelled of marijuana" to respondent, thus invoking *N.J.S.A.* 18A:40A-12 and Policy 5131.6. The Commissioner rejects respondent's argument that he has the discretion to confirm teachers' judgments that a student appears to be under the influence of alcohol or drugs. *N.J.S.A.* 18A:40A-12 and Policy 5131.6 squarely place the responsibility of making final judgment on the *medical* community.

Accordingly, the Commissioner finds respondent guilty of unprofessional and unbecoming conduct for his failure to arrange for the *immediate medical examination* of N.L. pursuant to *N.J.S.A.* 18A:40A-12 and Policy 5131.6.

Tenure Charges No. 3 and No. 4[9]

The Board originally filed tenure charges alleging that during the 1995-96 and 1996-97 school years, respondent exhibited unprofessional and unbecoming conduct by failing to comply with *N.J.S.A.* 18A:40A-12 and Policy 5131.6. These charges were amended by the Commissioner's interlocutory order to include a 1991 incident and a 1994 incident. These charges, therefore, concern four separate incidents that occurred between 1991 and 1996, each of which will be considered separately.

1991 incident

Finding that respondent was in a better position than the Student Assistant Specialist, Ms. Musetti, who had no prior contact with the student, to understand the reasons behind the student's rage, the ALJ concluded that respondent's refusal to honor Ms. Musetti's request that the student be "tested" represented a "sensible rather than a literal" interpretation of the law and did not constitute a violation of statute or Board policy. The ALJ, therefore, concluded that respondent was not guilty of unprofessional and unbecoming conduct in the 1991 incident.

[9] Tenure Charge No. 3 addresses violation of the statute, *N.J.S.A.* 18A:40A-12, and Tenure Charge No. 4 addresses the Board's Drug, Alcohol and Tobacco Policy 5131.6. Since the policy essentially reflects the language of the statute, these charges are being considered simultaneously.

The Commissioner finds he cannot accept the ALJ's conclusion. As previously indicated, once a staff member has reported that a student appears to be under the influence of alcohol or other drugs, the principal or his designee *shall* arrange for an *immediate medical examination* for that student; the statute does not provide respondent discretion to substitute his/her judgment for that of the staff member. This incident, however, presents the unusual circumstance where a report was made by a teaching staff member, Ms. Musetti, who requested that the student be "tested" immediately after observing, and based solely upon, the same behavior also witnessed directly by respondent. Not inappropriately under the circumstances, respondent explained to Ms. Musetti that he believed the student was angry because respondent had just disciplined him, not because he was under the influence of drugs**.** Ms. Musetti, however, who is a trained and certified substance [awareness] coordinator serving in the position of Student Assistance Specialist (Tr. 12/7/99 at 5), persisted in her belief that the student exhibited indications of possible substance abuse. (Tr. 12/7/99 at 42-44) Once this occurred, respondent then had an obligation to arrange for the *immediate medical examination* required by law. Notwithstanding any concern respondent may have had as to whether Ms. Musetti's request that the student be "tested" might be unreasonable because she had no prior contact with the student, respondent's obligation to arrange for an immediate medical examination was mandatory under the statute and Board Policy.

Accordingly, the Commissioner must conclude that respondent is guilty of unprofessional and unbecoming conduct for his failure to arrange for the *immediate medical examination* of the "rage" student in the 1991 incident pursuant to *N.J.S.A.* 18A:40A-12 and Policy 5131.6.

1994 D.M. incident

The ALJ determined that there was insufficient evidence to conclude that respondent neglected his duties with respect to "drug testing" in the 1994 D.M. incident.

The Commissioner is unpersuaded by the Board's arguments that Ms. Musetti's testimony should be ascribed greater deference than it was accorded by the ALJ. Accordingly, the Commissioner determines that the Board has not proved by a preponderence of credible evidence that respondent neglected his duties under *N.J.S.A.* 18A:40A-12 and Policy 5131.6 for the reasons expressed in the Initial Decision.

1995 A.F. incident

Finding that respondent waited until the next day to "test" a student referred to him under *N.J.S.A.* 18A:40A-12 and Policy 5131.6, the ALJ determined respondent guilty of unprofessional and unbecoming conduct for the A.F. incident.

N.J.S.A. 18A:40A-12 and Policy 5131.6 require an *immediate medical examination* for a student reported as appearing to be under the influence of alcohol or drugs, and states that the student is to be taken to the nearest hospital emergency room if the parent's physician or the school's medical inspector is not available. In the A.F. incident, respondent deferred the "test" until the next day to accommodate A.F.'s parent. Clearly, respondent did not immediately respond to this incident as contemplated in the statute.[10]

Accordingly, the Commissioner finds respondent guilty of unprofessional and unbecoming conduct for his failure to arrange for the *immediate medical examination* of A.F. in the 1994 incident pursuant to *N.J.S.A.* 18A:40A-12 and Policy 5131.6.

1996 J.B. incident

The ALJ found that all staff members, including the referring teacher, Ms. Curasco, and Ms. Musetti, Ms.Tierney and respondent, contributed to the delay in "testing" J.B., but concluded that it was not logistically impossible for respondent to implement the "drug test" sooner than the time he was actually tested. Therefore, the ALJ concluded that respondent

[10] Ms. Musetti, the Student Assistant Specialist, testified in regard to the delay in "testing," and was echoed by other staff members, that a primary concern was compromising the drug test by such delay.

violated *N.J.S.A.* 18A:40A-12 and Policy 5131.6, and thus respondent was guilty of unprofessional and unbecoming conduct for the J.B. incident.

The record shows that *no one* involved with the J.B. incident proceeded as if J.B. needed an immediate medical examination. However, that does not excuse *respondent's* lack of prompt action once responsibility of J.B. was delegated to him. Even under the established practices of the District, respondent did not act appropriately. Respondent did not verify whether J.B. was in school on November 6, 1996, nor did he take J.B. to the nurse to assess whether J.B. was in a medical crisis, and respondent did nothing to assure that J.B. was not left alone while awaiting testing. Most importantly, respondent did not immediately arrange for J.B. to be medically examined as contemplated in the statute and specified in the Board's policy.

Accordingly, the Commissioner finds respondent guilty of unprofessional and unbecoming conduct for his failure to arrange for the *immediate medical examination* of J.B. in the 1996 incident pursuant to *N.J.S.A.* 18A:40A-12 and Policy 5131.6.

Penalty

In considering the penalty to be assessed respondent for his acts of unbecoming and unprofessional conduct noted above, the Commissioner has considered the nature and gravity of the offenses, the extenuating and aggravating circumstances and the necessity of maintaining discipline and proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 420-22 (App. Div. 1967).

Respondent is an experienced administrator who has served the District for 34 years. During this time, respondent has received positive evaluations and his record is unblemished, except for the charges herein. The Commissioner takes specific notice of the fact that, prior to N.L.'s death in 1999, no action, *i.e.*, no mention in evaluations, no letter of reprimand, increment withholding, *etc*., was taken to discipline respondent for what the Board now finds was respondent's egregious failure to properly "test" students in 1991, 1994, 1995,

1996. Further, it is noted that virtually all of those who testified in this matter, including most of the Board's witnesses, testified that respondent performed his job well and that they respected him. Two of the Board's witnesses, Ms. Ammerman and Ms. Remolino, as well as a significant number of other staff members, signed a petition in support of respondent. (Exhibit R29) Mr. Tucker, former president of the Wayne Education Association (WEA) and a Board witness, stated that he would rank respondent in the top three of all the vice principals he worked with during his 36 years in education. (Tr. 12/9/99 at 23-24) Further, respondent's former principals, Mr. Reis and Mr. DeVries, the vice principal with whom he served at the time of the J.B. incident, Ms. Tierney,[11] and Mr. Modica, WEA's grievance chairperson, testified on his behalf.

The Commissioner also cannot ignore that the Board has not properly implemented *N.J.S.A.* 18A:40A-12 and the Board's Policy 5131.6. As noted above, notwithstanding the requirement in statute and Board policy that a student reported as appearing to be under the influence of alcohol or drugs must be immediately examined by a physician, the Board has established a practice in the District which ignores that mandate and substitutes drug screening in its stead. Additionally, the Commissioner notes that the Board took no disciplinary action against any other staff members who failed to properly implement the statute and policy. The Commissioner finds that the Board's statement, that tenure charges were not filed against other staff members who similarly violated statute and policy because those individuals did not exhibit a pattern of non-compliance, sends a mixed message to District staff. (Board's Reply Exceptions at 32) The Board not only did not take action with regard to tenure charges against any other staff members, but also took no other disciplinary measures to impress upon staff

[11] The Commissioner notes Ms. Tierney's testimony that she received a *Rice* notification that her performance would be discussed by the Board at about the time of her agreement to testify on behalf of respondent. (Tr. 1/12/00 at 48) Board Member Howard Weinburg testified that the Board sent Ms. Tierney the *Rice* notification because it wanted to discuss some parental complaints the Board had received as to Ms. Tierney's actions in her school relative to her performance. (Tr. 3/2/00 at 58) Mr. Weinburg also testified that as far as he was aware Ms. Tierney was performing satisfactorily in December 1999 at the time of the parental calls to the Board, and he also stated that the *Rice* notice and Ms. Tierney's testimony in this case were not connected in any way. (Tr. 3/2/00 at 61, 65)

members violating the law, and upon District employees in general, the seriousness of non-compliance**.** Moreover, the record suggests that the Board's in-service training for staff members and administrators with respect to the statute and the Board's Policy on the treatment of students who are reported as appearing to be under the influence of alcohol or other drugs is woefully inadequate. Although the District's Core Team members apparently receive three days of training each year, there appears to be no organized training mechanism for other staff and administrators. Testimony by teaching staff, nurses and administrators in the District underscores the fact that, despite what appears to be a clear policy, there is considerable confusion in the District about its implementation. The Board argues that any penalty short of dismissal will be futile, because if respondent is allowed to return to the District, he will continue in his belief that he has the authority to exercise discretion as to whether to "chemically screen" students. The Commissioner finds this argument spurious in light of the Board's own erroneous assumptions with respect to implementation of statute and policy, and he concurs with the ALJ that the results of these proceedings should disabuse respondent of any belief that administrators have the discretion not to refer for medical examination any student reported as appearing to be under the influence of drugs or alcohol.

Respondent argues that he should not be held accountable for his actions because he did not *willfully* violate *N.J.S.A.* 18A:40A-12 and the Board's Policy 5131.6. The Commissioner notes that respondent is an experienced administrator who is responsible for keeping himself fully informed of the laws and policies that he must administer as a vice principal. By respondent's own admission, he was fully aware that Ms. Musetti, the Student Assistant Specialist and a member of the Core Team, strongly disagreed that the principal or his designee had discretion as to whether to "test" a student referred to him as appearing to be under the influence of alcohol or drugs. Nothing precluded respondent from seeking clarification once

this view was presented to him. As the ALJ observed, although respondent's employment record does not show respondent to be the reckless lawbreaker portrayed by the Board (Initial Decision at 31), there is evidence that respondent made conscious decisions which he knew, or should have known, contravened statute and the Board's policy.

Upon thoughtful consideration, the Commissioner finds it necessary to balance the totality of the record herein with the need to impress most emphatically upon respondent the seriousness of his conduct. The Commissioner agrees with the ALJ that, in view of the mitigating circumstances in this matter, the extreme penalty of loss of tenured employment is not warranted. However, the Commissioner also concurs that respondent's failure to arrange for an *immediate medical examination* for students reported to him by staff members as appearing to be under the influence of alcohol or other drugs is a serious infraction deserving a significant penalty, regardless of mitigating circumstances.

Accordingly, under all the circumstances of this matter, the Commissioner determines to adopt the ALJ's recommendation that the appropriate penalty to be levied on respondent is a permanent reduction of one step on the salary guide and forfeiture of all salary and benefits that would otherwise have accrued during the first 120 days of his suspension.

In adopting the ALJ's recommended penalty and conclusions as modified above, however, the Commissioner once again stresses that *a drug test does not equate to a medical examination* within the requirements of the statute as the Initial Decision suggests. Further, the statute's requirement for an *immediate medical examination* of a student who is reported as appearing to be under the influence of alcohol or drugs dictates that such examination must be conducted by a physician, not by any other person or means. Finally, the issues raised in this matter underscore the need for district boards of education to have clear policies in place, and to ensure that teaching staff members, school nurses and other educational personnel are well instructed with respect to their responsibilities under the statute and identification of symptoms

and behavioral patterns indicative of substance abuse.[12] The Commissioner, therefore, directs the Board to undertake such revisions of its policies and procedures as are necessary to reflect the requirements of *N.J.S.A.* 18A:40A-12 and implementing rule consistent with the decision herein, to institute a program of continuing education so that staff members will be able to fulfill their obligations under the law, and to submit such required revisions and plans to the County Superintendent for review and approval.

IT IS SO ORDERED.[13]

COMMISSIONER OF EDUCATION

Date of Decision: _____

Date of Mailing: _____

[12] It is imperative that such training include instruction in the identification of *specific observable indicators* of substance abuse so that staff members are able to recognize and appropriately report students exhibiting these, in contrast to expressing general concerns about a student's health or behavior.

[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.