

New Jersey Commissioner of Education**Final Decision**

B.A. and R.R., on behalf of minor child, E.A.,

Petitioners,

v.

Board of Education of the West Essex Regional
School District, Essex County,

Respondent.

Synopsis

Petitioners appealed the decision of the respondent Board to suspend their child, E.A., for five days after a substitute teacher observed E.A. in the student restroom with a vaping device in her mouth, and a subsequent urine drug screen collected the following day yielded a “negative dilute” result. The Board assumed that the dilute test result indicated tampering with the sample and interpreted the test as a “presumptive positive” result. Based on this, the Board determined that E.A.’s alleged use of a vaping device warranted a suspension under the Board’s Substance Abuse Policy (R 5530). Petitioners alleged that the Board repeatedly violated school policy in its disciplinary actions relating to their daughter and sought, *inter alia*, to have the suspension expunged from E.A.’s student record.

The ALJ found, *inter alia*, that: E.A.’s testimony lacked credibility, while the testimony of the Board’s witnesses was straightforward and direct; school board policies are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable; the Board admitted that it did not immediately send E.A. for a urine drug screen as its policy requires, however petitioners’ assertion that this error rendered the suspension arbitrary, capricious, or unreasonable is without merit; likewise, petitioners’ contention that the interpretation of the dilute negative urine test as a presumptive positive result was arbitrary, capricious, and unreasonable, was unconvincing given the Board’s ample demonstration that it had followed this practice for many years; petitioners bears the burden of showing that the respondent’s actions were arbitrary, capricious or unreasonable and failed to do so. The ALJ concluded that the five-day suspension was not arbitrary, capricious, or unreasonable; accordingly, E.A.’s suspension was affirmed, and the petition was dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ’s findings of fact and credibility determinations but did not concur with all the ALJ’s conclusions of law, determining, *inter alia*, that the Board’s decision to suspend E.A. for five days based solely upon a negative dilute urine screen was unreasonable and unsupported by the Board’s Substance Abuse Policy (R 5530) or the 2021-2022 Student Handbook. Accordingly, the Commissioner directed the Board to remove from E.A.’s student records all information pertaining to the unreasonable disciplinary action taken against her in May 2022.

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

New Jersey Commissioner of Education

Final Decision

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v.

Board of Education of the West Essex Regional
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Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the petitioners pursuant to *N.J.A.C. 1:1-18.4*, and the Board's reply thereto, have been reviewed and considered.

This matter involves the Board's decision to suspend E.A. for five days. A substitute teacher familiar with E.A. observed her in the student restroom with a blue vaping device in her mouth, and a urine drug screen she took the following day yielded a "negative dilute" result. Assuming tampering had occurred, the Board interpreted the dilute result as a "presumptive positive" result and determined that it warranted a suspension under the Board's Substance Abuse Policy (R 5530). The Administrative Law Judge (ALJ) concluded that the five-day suspension was not arbitrary, capricious, or unreasonable.

Although the Board admitted that it did not immediately send E.A. for a urine drug screen as its policy requires, the ALJ rejected petitioners' contentions that the Board's misstep

rendered the suspension arbitrary, capricious, or unreasonable, and declined to find that the Board acted in bad faith. The ALJ also rejected petitioners' assertion that the Board's decision to interpret the dilute result as a presumptive positive result was arbitrary, capricious, or unreasonable, finding that the Board "amply demonstrated this practice going back to at least 2007." Finally, the ALJ rejected petitioners' claim that a subsequent urine drug screen from E.A., which yielded a positive result for marijuana metabolite, should be disregarded because the threshold used to interpret the result did not conform to United States Department of Transportation (DOT) guidelines utilized by the district.

In their exceptions, petitioners again argue that: (1) the Board's actions to suspend E.A. were arbitrary and committed in bad faith; (2) the Board failed to follow its own policy in that it did not send E.A. for a drug screen until the day after she was allegedly observed vaping; and (3) the Board arbitrarily interpreted the negative dilute result as a presumptive positive result. In addition, petitioners contend that it was unreasonable for the Board to require E.A. to produce a clean urine drug screen before returning to school after she had served the five-day suspension because marijuana is known to stay in the body for up to thirty days.

In reply, the Board argues that its actions were reasonable given the circumstances and were not undertaken in bad faith. While it acknowledges that Board policies did not state that a negative dilute result would be considered a presumptive positive result warranting a suspension, it maintains that its actions were reasonable given the objective nature of the testing and its past practice of interpreting dilute results in this fashion for approximately fifteen years. Moreover, the Board asserts that petitioners' reliance on DOT guidelines is misplaced as the Commissioner does not require districts to follow them. Finally, the Board

contends that because petitioners did not raise the school “re-entry” claim before the ALJ, their argument on that issue should be disregarded.

Upon review, the Commissioner concurs with the ALJ’s findings of fact and credibility determinations while partially concurring with the ALJ’s conclusions of law. Initially, the Commissioner agrees with the ALJ that it was reasonable for the Board to refer E.A. for a urine drug screen the day after she was observed with the vape pen. However, the Commissioner disagrees with the ALJ’s conclusion that the Board’s decision to suspend E.A. for five days because her drug screen yielded a negative dilute result was reasonable.

The Legislature granted local boards of education sweeping authority to enact rules regarding operation of their public schools. *N.J.S.A. 18A:11-1(c), (d); Bd. of Educ. of City of Plainfield v. Cooperman*, 105 N.J. 587, 596 (1987). Board action conducted within the ambit of its broad discretionary authority “may not be upset unless patently arbitrary, without rational basis or induced by improper motives.” *Kopera v. W. Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960). Board determinations are “entitled to a presumption of correctness.” *Thomas v. Bd. of Educ. of Twp. of Morris*, 89 N.J. Super. 327, 332 (App. Div. 1965), *aff’d*, 46 N.J. 581 (1966). The Commissioner may not substitute her judgment for that of the Board. *Schinck v. Bd. of Educ. of Westwood Consol. Sch. Dist.*, 60 N.J. Super. 448, 476 (App. Div. 1960).

Boards may suspend a student from school if the student’s conduct constitutes “good cause” for suspension. *N.J.S.A. 18A:37-2*. While the statute lists several examples of conduct that satisfy the good cause standard, boards may suspend a student for other reasons so long as the good cause standard is met. State education regulations require boards to implement a code of student conduct, aimed at “foster[ing] the health, safety, and social and emotional

well-being of students,” which must establish parameters for discipline and include a description of conduct that will result in suspension. *N.J.A.C. 6A:16-7.1(a), N.J.A.C. 6A:16-7.1(b), N.J.A.C. 6A:16-7.1(c).*

Additionally, in the interest of student health and safety, boards are required to implement “a comprehensive substance abuse intervention, prevention and treatment referral program” in their elementary and secondary schools to “identify pupils who are substance abusers, assess the extent of these pupils’ involvement with these substances and, where appropriate, refer pupils and their families to . . . professional treatment.” *N.J.S.A. 18A:40A-10.* The statute defines “substances” to include “[a]ny chemical or compound that releases vapor,” and the policies apply to “students who consume or are suspected of being under the influence of or who possess” substances on school grounds. *N.J.S.A. 18A:40A-9; N.J.A.C. 6A:16-4.1(a).*

To satisfy this legislative mandate, boards must “adopt and implement . . . policies and procedures for the evaluation, referral for treatment and discipline of pupils involved in incidents of possession or abuse of substances . . . on school property.” *N.J.S.A. 18A:40A-11; N.J.A.C. 6A:16-4.1(a).* The Board’s Substance Abuse Policy (R 5530) provides that students found in possession of or using a “vape product” on school grounds “will be assessed to determine if the student is under the influence of drugs or other substance.” Additionally, it states that “[s]tudents who violate the substance abuse rules will be disciplined as per the Code of Conduct outlined in the Student Handbook.”

The Board’s 2021-2022 Student Handbook states that conduct involving “Tobacco Products Electronic cigarettes/Vaping products (paraphernalia) (and) Smokeless Tobacco Items containing Nicotine” violates the student code of conduct and will result in a two-day

suspension for a student's first offense. The Student Handbook distinguishes this conduct from conduct involving "possession of drug or drug paraphernalia or use of an illegal substance." If a student is found to be in "possession of an illegal substance or paraphernalia while in school," a suspension "not less than ten days" is imposed. If a student is found to be "under the influence" of an illegal substance while at school, a suspension "not less than five days" is imposed for a first offense.

In this case, a substitute teacher deemed credible by the ALJ testified that she saw E.A. in the student restroom with a blue vape pen in her mouth on May 12, 2022. E.A., found to be "not credible" by the ALJ, denied vaping in the restroom but claimed that she used marijuana the night before and generally consumes a lot of water. The substitute teacher did not report the incident until the end of the school day.¹ Consequently, E.A. was not interviewed by the assistant principal or drug screened until the following day, May 13, 2022. At that point, E.A. was not in possession of the vape pen. However, the assistant principal – deemed credible by the ALJ – testified that she explained to E.A. that "a staff member . . . saw her in the bathroom the previous day vaping" and that E.A. "acknowledged that it had happened." The assistant principal further testified that a decision was made to send E.A. for a urine drug screen the following day because it was not known what substance the vape pen contained.

At the outset, the ALJ's credibility findings are entitled to deference. *In re Young*, 202 N.J. 50, 71 (2010). The Commissioner agrees with the ALJ that there is nothing in the record to establish that the Board acted in bad faith by sending E.A. for a drug screen the day after the incident in the restroom. Given the circumstances, it would have been unreasonable and

¹ N.J.S.A. 18A:40A-12(a) requires that such incidents be reported to the school nurse or student assistance counselor (SAC) and the principal or designee "as soon as possible."

contrary to the Board's Substance Abuse Policy to decline to refer E.A. for a urine drug screen solely because the substitute teacher did not immediately report the incident. As noted, the purpose of the referral program is to identify pupils who may need substance abuse treatment. *N.J.S.A. 18A:40A-10; N.J.S.A. 18A:40A-11.* The Board's actions reasonably comport with that important goal.

However, the Commissioner finds that the Board's decision to suspend E.A. for five days based upon a negative dilute urine screen result was arbitrary and lacked a rational basis. Credible testimony from both the assistant principal and the Student Assistance Counselor (SAC) confirmed that the Board chose not to suspend E.A. for possession of a vape pen. Rather, the Board suspended E.A. following its receipt of the negative dilute urine screen result on May 19, 2022. On that same date, petitioners were informed in writing that "a DILUTE result is considered positive according to [Board] policy" and thus warranted a five-day suspension for E.A. But neither the Board's Substance Abuse Policy (R 5530) nor the 2021-2022 Student Handbook indicate that students will receive a five-day suspension if their urine drug screen yields a negative dilute result, or that such a result will be treated as a presumptive positive.²

On the contrary, the Board's Substance Abuse Policy (R 5530) states that once a student is referred for a screening to determine whether she is under the influence, "the student shall be allowed to return to school until such time as a positive determination of alcohol or other drug use is received from the examining physician, unless the student was also removed for violating the Code of Student Conduct." It also states that "[i]f the written report of the

² Effective August 17, 2022, the Board amended its Substance Abuse Policy (R 5530) to state that students found in possession of vape products will be sent immediately for a urine screening and must provide "a non-dilute, non-adulterated sample." It now states that "[a] dilute screen is a presumptive positive test result" and that "[a]ppropriate disciplinary action shall be taken for a positive test result." The propriety of its actions in that regard is beyond the scope of this petition of appeal.

medical examination verifies that alcohol or other drugs do not interfere with the student’s physical and mental ability to perform in school, the student will be immediately returned to school.” The Substance Abuse Policy (R 5530) makes no mention of either the significance or ramifications of a dilute result.

The record indicates that E.A. was medically cleared to return to school by a physician on May 13, 2022—the same day she completed the initial urine drug screen. And yet, the Board imposed the five-day suspension beginning on May 20, 2022, upon its receipt of the negative dilute urine screen result absent any evidence that she deliberately tampered with the sample. While the Student Handbook contemplates a suspension of not less than five days for a first offense if a student is found to be “under the influence” of an illegal substance while at school, the negative dilute urine screen result—collected the day after E.A. was observed with a vape pen in the student restroom—failed to establish that E.A. was under the influence of drugs or other substances on school grounds on May 12, 2022.

It is not known from the record whether the vape pen contained an illegal substance. The fact that a subsequent urine sample collected during E.A.’s suspension on May 24, 2022 yielded a positive result for marijuana metabolite fails to support the conclusion that E.A. was under the influence of marijuana at school on May 12, 2022, when she was observed with the vape pen in her mouth.³ The Board’s SAC, qualified as an expert by the ALJ, conceded that “it’s impossible to tell exactly when someone inhaled marijuana, how you, how many metabolites

³ Any urine screens taken by E.A. after May 20, 2022, the date her suspension took effect, could not have factored into the Board’s decision to suspend her, and therefore do not assist the Commissioner in determining whether the five-day suspension was arbitrary, capricious, or unreasonable. Thus, the Commissioner need not address petitioners’ contention that the May 24, 2022, test result deemed positive for marijuana metabolite (21 ng/mL) by High Focus Treatment Center should be deemed negative under the Board’s screening threshold of equal to or greater than 50 ng/mL. In any event, while they may be informative, DOT standards are not controlling in this matter.

were in their system, but marijuana can stay in your system, obviously, for some period of time.”

In addition, credible testimony from the assistant principal and the Board’s SAC undermines the Board’s position that it was reasonable to interpret the negative dilute urine screen result as a presumptive positive. The assistant principal credibly testified that she informed E.A. that if the drug screen “comes back positive, yes you’re going to be suspended. If it comes back negative, then no.” Moreover, the SAC testified that he informed E.A. and her stepfather before they departed school grounds to attend the drug screening that she “should not drink copious amounts of water because it could render the [drug screen] results inconclusive.” While it would have been reasonable for the Board to view the negative dilute urine screen result as inconclusive and to request that E.A. provide another urine sample, it was unreasonable for the Board to treat it as a presumptive positive result warranting a five-day suspension absent any basis for same other than apparent past practice in the district dating back to 2007.

As for petitioners’ contention that it was unreasonable for the Board to require E.A. to produce a clean urine drug screen before returning to school because marijuana is known to stay in the body for up to thirty days, the Commissioner finds that petitioners failed to offer any competent evidence to support their position.

In sum, the Commissioner holds that the Board’s decision to suspend E.A. for five days based solely upon a negative dilute urine screen was unreasonable and unsupported by the Board’s Substance Abuse Policy (R 5530) or its 2021-2022 Student Handbook. The Board is

hereby directed to remove all information pertaining to the unreasonable disciplinary action taken against E.A. from her student record.

IT IS SO ORDERED.⁴


ANGELINA ALLEN McMILLAN, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 27, 2023

Date of Mailing: June 28, 2023

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 06247-22

AGY REF NO. 196-7/22

B.A. AND R.R., ON BEHALF OF E.A.,
Petitioners,

v.

WEST ESSEX REGIONAL SCHOOL DISTRICT
BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

B.A. and **R.R.** parents on behalf of E.A., petitioner, pro se

Leslie A. Koch, Esq., for respondent (Methfessel & Werbel, attorneys)

Record closed: February 10, 2023

Decided: April 6, 2023

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a pro se Petition of Appeal seeking Emergent Relief with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE) on July 27, 2022.

Said emergent motion sought an order removing a disciplinary suspension imposed upon E.A.; compensatory education; a review of School Policies, procedures and staff training; and such other relief deemed appropriate by the Commissioner.

Respondent Board filed its Answer to the Petition, a brief in opposition to the request for emergent relief, and the Certification of Anthony V. Emering, with Exhibits 1 through 8.

Oral argument via Zoom was held on August 2, 2022. The emergent application was denied orally from the bench and memorialized in an Order.

A telephone conference was held on September 16, 2022, to discuss scheduling of oral argument on a motion for summary decision filed by Respondent, scheduling of the hearing should the motion be unsuccessful, and to address the student's status pending a decision on the instant matter. An Order was entered the same date directing Respondent to stay E.A.'s status as "not in good standing" until the entry of an Initial Decision in the within matter.

Respondent filed a motion for summary decision on September 9, 2022. Petitioner filed his response thereto, and a counter motion for summary decision, and a motion to compel discovery on September 21, 2022. Respondent filed its brief in opposition to the counter motion for summary decision on October 10, 2022. Petitioner filed his reply thereto on October 23, 2022. Oral argument on the motions was held on November 17, 2022. An Order was entered on November 18, 2022 denying the motion for summary decision and the cross motion for summary decision.

The undersigned reserved on the motion to compel discovery and directed the parties from the bench, at the conclusion of oral argument on the cross motions, to work out the discovery issues, as set forth in said order.

The hearing was held on December 20, 2022. The parties were granted time to obtain transcripts of the proceedings and to submit written summations. Each party submitted their written summations on February 10, 2023, whereupon the record was closed.

SUMMARY OF RELEVANT TESTIMONY

E.A. testified as follows:

Direct Examination

She was in the bathroom on May 12, 2022, between classes. Suddenly all the kids in the bathroom scrambled. She was unsure of how many kids were in the bathroom. A substitute teacher, Ms. Caria, walked into the bathroom. E.A. was unsure at what time that occurred.

The next day she was taken to the office by Mr. Emering. In the office were Westervelt and Hoebee. They were asking her questions. She was told she was in the office because she was vaping. She responded "oh".

Her mother was then called, who was at work. She was not sure if her father, B.A., was called. Her stepfather, J.R., was called. He picked her up from school and took her home.

When in the office she was told she would be drug tested. She admitted to using marijuana the night before, terming it "one tiny hit".

She further explained that she drinks a lot of water, and did so the morning of Friday, May 13, 2022.

Cross Examination

She has applied to several colleges, nine in total. She has been accepted at the University of Arizona, the University of Delaware, Penn State, Ohio State and Indiana. She has not heard from the other schools, as yet.

While she was suspended she had access to Google Classroom.

She reviewed her grades and report card. She did well, except for Latin. She received a D- on the final. She received a D+ on the Latin mid-term exam.

Her cumulative GPA is 4.2024.

Violet Capria testified as follows:

DIRECT EXAMINATION

She is employed by West Essex Regional High School as a permanent substitute teacher. She knows E.A. who was in her proctoring for make up assignments. She spent a whole week with E.A. This was during E.A.'s junior year (2021/2022 school year).

On May 12, 2022 she entered the bathroom and went into a stall. When she left the stall she saw there were a group of students there. She saw E.A. and saw a blue vape in her mouth. The students "jaws dropped" when they saw her. She then washed her hands and left. E.A. was the only one she observed vaping. She estimated six other girls in the bathroom.

Ms. Capria knew she had to tell someone what she saw. However, she had a classroom full of students and went there. She advised the office of what she saw at

the end of the day. She told Ms. Kim Westervelt, who is her supervisor. This occurred about 2:35 p.m.

CROSS EXAMINATION

When she told Ms. Westervelt what occurred, she was advised that next time she is to report it right away.

She did not make a written report.

BY THE ALJ

Ms. Capria had no doubt that it was E.A. she observed with a vape pen in her mouth.

B.A., Petitioner, testified as follows:

The school did not follow their own policies. The policy does not state that a negative dilute is presumed a positive test. There is no school nurse to examine the student. There was no official report.

The first drug screen was “negative dilute”. The second was “interference”. The next test was “negative (less than a 5ngl level). The last test was negative in his view as it was below school mandated levels.

CROSS EXAMINATION

B.A. has no experience or training in interpreting drug screen results. He has no experience in writing or interpreting school policies.

Kimberly Westervelt testified as follows:

She is the Assistant Principal at West Essex Regional High School. She is familiar with the school substance abuse policy and regulations. She has implemented this protocol probably twenty to thirty times in the past two years.

She had no reason to doubt Ms. Capria when she advised she saw E.A. using a vape pen. Ms. Westervelt knows Ms. Capria had proctored mid-term exams for E.A.

Ms. Westervelt put the time Ms. Capria advised her of what she saw at around 3:30 p.m., not the 2:35 p.m. Ms. Capria had stated.

After she spoke with Ms. Capria she wrote down what was told to her. She then called the Principal, who was no longer in the office. The other assistant principal had left for the day. Ms. Westervelt then made a decision to speak with them the next day in the morning.

The next day she spoke with the Principal and the other assistant principal. They decided to enact the protocol and send E.A. for drug screening. Vaping requires drug screening as it is unknown what may be in the vape pen.

E.A. was brought into Ms. Hoebee's office. She was told her bag was to be searched. Nothing was found. E.A. was then told she would be sent for a drug screening, and that her parents would be called. At this point E.A. became visibly upset. E.A. stated that she had smoked marijuana the night before. She was told if the drug screen comes back positive she would be suspended; if negative, she would not be. E.A.'s mother was called and it was arranged that her stepfather would pick her up. In the room at this time were Ms. Westervelt, Ms. Hoebee, Mr. Emering and E.A.

When E.A. left with her stepfather Ms. Westervelt was under the impression that they would proceed to a Doctor's Care Facility for the drug screening.

About one hour later B.A. called the school and was advised that E.A. had to go for drug screening or would be immediately suspended. E.A. did later on that day receive a drug screening.

CROSS EXAMINATION

Moving forward, Ms. Westervelt stated that the protocol would be enacted at the end of the school day. She was not aware that E.A. was in the school until 4:00 p.m. on May 12, 2022.

She tried to call Mr. Diliberto on May 12, 2022, but was unable to speak with him.

The protocol for E.A. began at 10:45 a.m. on May 13, 2022.

If a student is out of compliance with the substance abuse policy they cannot be in school unless they are in treatment.

E.A. was not suspended immediately. The drug screening results were received about a week later. That is when the suspension began.

E.A. did not get suspended for vaping as she was not in possession of a vape pen when in the office the next day. This was a unique case.

Ms. Westervelt recalled speaking with B.A. later in the day on May 13, 2022.

E.A. was suspended for five days and medically excused for four days. The reason for being medically excused was that she had not been medically cleared to return to school. Medically excused is not in the school policy. It is a consistent practice of the school.

B.A. was combative when he called. He was advised that E.A. was not suspended. The drug screening results were needed first.

BY THE AJL

Ms. Westervelt stated that a “negative dilute” has been viewed as a positive test for purposes of suspension. That has been the school policy during her tenure of three plus years as vice principal. E.A.’s parents were not informed that a negative dilute would result in a suspension.

Ms. Westervelt was not aware that school policy had been changed, after the incident with E.A., to interpret a negative dilute result as a positive result.

Antony Emering testified as a student assistance counselor, as follows:

He is employed by West Essex Regional High School as the student assistance counselor, and, secondarily, as the coordinator of Section 504 accommodations.

Part of his duties is to read and interpret drug screening results.

He is always consulted when a student may be sent for drug testing so he can coordinate preparation of forms, and also alert the testing facility that a student may be coming.

He was with Ms. Westervelt and Ms. Hoebee the morning of May 13, 2022, when they were discussing whether or not to have E.A. go through the substance abuse protocol. He was on board with the decision to do so.

He knows E.A. and explained to her the process. He also spoke with her stepfather, and informed him of what needed to be done. He advised that E.A. should not drink copious amounts of water as it could render the results inconclusive.

Two validity markers come into play with a urine sample: creatine and specific gravity. Specific gravity has to be above 1.000. This is the cutoff threshold. Both are looked at by a medical review facility. There is the collection facility. The sample is sent to a lab. A doctor independent of the testing facility reviews the results and sends a report to the school. He determines whether the results are positive, negative, dilute or any other potential issues. E.A.'s sample was negative dilute. Her sample had a specific gravity of 1.0011. Anything under 1.0030 is a potential issue. The creatine was 10.7 milligrams per deciliter. Anything under 20 milligrams per deciliter is considered a potential dilution.

Mr. Emering then described marijuana testing. A June 2, 2022 drug screen done by High Focus showed a positive test for marijuana (21 nanograms per milliliter). A prior test result from High Focus (5/28/22) shows a result of "interference". Mr. Emering had never before seen a test with this result. This means the sample was untestable. E.A.'s mother was correct to have her retested immediately after the "interference" result was obtained. The second test showed the 21 nanograms per milliliter result.

The first test of E.A. (Friday, May 13, 2022) was delayed for about four hours. The district did not enforce its two hour rule for testing. A clean, non-dilute, non adulterated urine screen is needed. The first test didn't qualify. The blood test she took, the fourth test, was acceptable for her to return to school. High Focus, where the test was done, recommended a treatment program for E.A. They recommended an intensive out patient program in their letter dated June 7, 2022.

E.A. was allowed to return to school without being enrolled in the program. She was re-evaluated by Charlie Health. They indicated E.A. should continue with her out patient provider.

Mr. Emering emailed the Petitioner with the return to school policy. He also had some telephone conversations with the Petitioner.

Mr. Emering was surprised that E.A. did not go directly to be tested after leaving school with her stepfather on May 12, 2022. He termed it “disconcerting”. Not going is considered a presumptive positive.

CROSS EXAMINATION

He is aware of the school policies regarding substance abuse. They are based on model policies in the State of New Jersey.

He is aware of the requirements under N.J.S.A. 18A:48-12 to test students suspected of being under the influence.

Mr. Emering stated that once you are reposed with information you have an obligation to send the student for testing. He further stated that it would be most ideal to test sooner, agreeing that testing on Thursday, May 12, 2022 would be the most ideal.

He did not receive a telephone call from Ms. Westervelt or Ms. Capria on May 12, 2022.

E.A. did not get suspended for vaping because the administration was trying to be even handed.

School policy was not followed. E.A. was not immediately sent for testing.

The Department of Transportation (DOT) guidelines are followed with their testing. The DOT would consider a negative dilute as a negative, or require a retest.

The DOT cutoff is 50, which is what the school uses. The High Focus result was 21, which is below 50. It is still a positive test. High Focus uses 20 as a cutoff level. The school can't dictate to High Focus what their cutoffs should be.

The first test was collected on May 13, 2022 at 3:58 p.m. The results came back on May 19, 2022. He called E.A.'s mother at 6:50 p.m. as that is when he received the results.

The third test was administered on June 1, 2022.

Mr. Emering would prefer a urine test to a blood test, as urine is more accurate in terms of substance abuse. The benefit of a blood test is that it is more difficult to doctor a blood test. The problem with a blood test is that it does not have validity markers.

The school policy was amended in August 2022 regarding a negative dilute result. Mr. Emering stated that he always considered a negative dilute unacceptable as a clean test. This since he began employment with the district in 2007. It is considered a positive test.

RE-DIRECT EXAMINATION

It is the past practice of the school to treat negative dilute test results as positive, and has been since he began his employment.

The school is not required to follow DOT guidelines. DOT guidelines relate to employees who are usually drivers.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters

such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.” State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness’s testimony. It requires an overall assessment of the witness’s story in light of its rationality, its internal consistency, and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963).

The testimony of E.A. appeared to be rehearsed. Her flat denial of vaping did not ring true. It was a self serving statement that was in direct opposition to the credible testimony of Ms. Capria. Further, I found her description of how much water she drinks to be merely an attempt to explain away the results of the first test, which came back as negative dilute. She had admitted that she smoked marijuana the night before the drug screen was administered. I otherwise found her to be a pleasant, articulate, and bright young woman. However, I cannot deem her testimony as to the crucial issue in this matter as credible.

B.A. was credible. However, he did not witness what transpired in the bathroom. He mostly argued that the school did not follow its own policy. He further argued that the test results should have been interpreted as negative.

Violet Capria was straightforward and direct in her testimony. She knows E.A. and was positive that it was E.A. she saw in the bathroom vaping. She had no doubt as to her observation. I deem her credible.

Kimberly Westervelt also was straightforward and direct in her testimony. She credibly stated the reasons for not strictly following school policy on May 12, 2022. I deem her credible.

Anthony Emering I found to be credible. His knowledge of substance abuse and testing was informative and helpful. He readily admitted that the best practice would have been to have E.A. tested on May 12, 2022, the day of the incident, as opposed to the next day. His explanation that it was still the better practice of testing the next day, as opposed to not all, was well stated.

FINDINGS OF FACT

1. E.A. is a student in the West Essex Regional School District. On May 12, 2022 she was a high school junior.
2. Petitioners, B.A. and R.R. are her parents.
3. On May 12, 2022, full time substitute teacher Violet Capria, was using the student bathroom. Upon exiting her stall she saw E.A. using a vaping device.
4. Ms. Capria did not report this incident to the school administration until the end of her school day, contrary to school policy which requires it be reported immediately. When she did report the incident, she did so to Kimberly Westervelt, assistant principal.

5. Kimberly Westervelt, upon receiving the information of E.A. vaping from Ms. Capria, attempted to contact the Principal and was unable. The other vice principal had left for the day. At this point, Ms. Westervelt made a decision to speak with them the next day. This is also contrary to school policy.

6. On May 13, 2022, Ms. Westervelt spoke with the principal and other assistant principal. It was decided to initiate the school protocol and send E.A. for drug screening. E.A. was brought to the office and met with Ms. Westervelt, Ms. Hoebee and Mr. Emering.

7. When told she would need to have a drug screen E.A. admitted to having smoked marijuana the night before and feared the test would be positive.

8. The school determined not to suspend E.A. for vaping, which carries a two-day suspension, as no vape pen was found in her possession on May 13, 2022.

9. The initial drug screen was delayed several hours as petitioner, B.A., did not immediately agree to have E.A. tested. Eventually, E.A. was tested on May 13, 2022 at The Doctor's Office of West Caldwell. The result was Negative Dilute. (P-6 and R-16)

10. The past practice of the district has always considered a Negative Dilute result as a positive result, at least as far back as 2007.

11. The initial drug screen results were received on May 19, 2022. (P-6 and R-16)

12. E.A. was suspended for five days after receipt of the initial drug screen. E.A. was also medically excused from school for an additional four days, pending receipt of a negative drug screen.

13. E.A. had four drug screens in total, as follows:

a. The initial drug screen with a Negative Dilute result, sample taken May 13, 2022.

b. High Focus – sample taken May 24, 2022 – with a result of Interference.

- c. High Focus – second sample taken on May 24, 3033 – with a positive result for THC
- d. June 6, 2022 – private blood test by E.A. physician – with a negative result

(R-24, Certification of Anthony Emering, Exhibits 4, 5, 6 and 8)

- 14. The student handbook provides for a two-day suspension for the use of vaping products. (R-3)
- 15. Student Discipline/Code of Conduct (R 5600) sets forth that suspension may be imposed for use of controlled dangerous substances. (R-5)
- 16. Substance Abuse is addressed in 5530 Substance Abuse, which sets forth that discipline can be imposed, and the procedures to be followed. (R-6)
- 17. School policy, as set forth in R-6, is for the student to be immediately referred to the principal, or other designated school official.
- 18. E.A. was not immediately referred to the principal. That was not done until the next day.
- 19. Regulation 5610 sets forth suspension procedures. (R-9)
- 20. Policy 5530 and Regulation 5530 (R-6 and R-7) in effect on May 12, 2022, do not mention a dilute screen test result.
- 21. Policy 5530 was amended in September 2022 to include a “dilute screen is a presumptive positive test result.”
- 22. E.A.’s grades did not suffer due to the suspension. She maintained good grades, with the exception of Latin, which she showed difficulty with prior to the suspension. (R-30 and R-31)

CONCLUSIONS OF LAW

School Board policies are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary,

capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith.

Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)). In matters involving the exercise of a local board of education's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). Therefore, petitioner must demonstrate much more than simply a difference of opinion over the action taken by respondent. In order to satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

N.J.S.A. 18A:37-2 states that, "Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct, shall include but not be limited, to any of the following: . . .(j)Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

Petitioner contends that the Respondent's failure to follow its policy should result in the suspension being vacated. Respondent's witnesses all admit the failure to follow policy. Ms. Capria did not report the vaping incident immediately but waited until her school day had ended. Ms. Westervelt did not contact the principal or other vice principal (each had left for the day); did not bring E.A. into the office assuming she had left school by the time she was informed of the vaping incident; did not contact E.A.'s parents; and, did not have E.A. immediately tested. The school did not do any of the

above until the following day. However, this delay does not make the school's actions arbitrary, unreasonable, or capricious. E.A. violated school policy by vaping. The school could not simply ignore this because it failed to follow its protocol.

The Respondent did not act in bad faith or in disregard to the circumstances. See P.S. o/b/o T.S. v. Bd. of Educ. Township of East Brunswick, et al., 10-1, 2019 WL 4928823, at *6 (N.J. Adm. Aug. 28, 2019). Respondent, via Ms. Westervelt, made a decision to address the incident the next day as she was unable to locate the principal and other vice principal. Nothing in this action is arbitrary, capricious or unreasonable. It was not ideal pursuant to their policy, but was certainly understandable given the lateness in the day when Ms. Westervelt received the information, coupled with her inability to reach the principal and other vice principal.

West Essex Regional School District Policy 5610 Suspension sets forth that "conduct which shall constitute for suspension ... shall include.. the conduct defined in N.J.S.A. 18A:37-2 and the school district's Student Discipline Code of Conduct Policy and Regulation in accordance with N.J.A.C. 6A:16-7.1."

The Respondent decided, given the circumstances of the instant matter, not to suspend E.A. for vaping. However, the Respondent determined that it should follow its protocol and send E.A. for a drug screen. That result was Negative Dilute, which the Respondent had interpreted as a positive result from at least 2007. This resulted in the suspension of E.A. for five days. E.A. continued out of school as being medically excused pending the receipt of a negative drug screen. Nothing about these actions, while not ideal, render them arbitrary, capricious or unreasonable.

Petitioner asserts that the Respondent's amendment to its Policy 5530 Substance Abuse to include a dilute result as unacceptable should render their past practice of interpreting such a result as a positive void. The Respondent has amply demonstrated this practice going back to at least 2007. That the Policy was amended

to now include this past practice does not render it arbitrary, capricious or unreasonable.

Petitioner also asserts that the Respondent's interpretation of the drug screens were inappropriate. As to the drug screen that was positive for THC Petitioner claims that it does not conform to DOT guidelines. DOT guidelines have the cutoff for marijuana at 50. The positive THC test has it at 20. As Mr. Emering stated in his testimony it was a positive test and the school is not bound by the DOT guidelines. Interpreting a positive test as just that cannot be deemed arbitrary, capricious or unreasonable.

Petitioner bears the burden of showing that the Respondent's actions were arbitrary, capricious or unreasonable. See Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)).

Petitioners have failed to carry their burden.

Based upon the above, I **CONCLUDE** that the facts support the Respondent's imposition of a five-day suspension of E.A., and that the same is not arbitrary, capricious or unreasonable.

ORDER

It is **ORDERED** that Respondent's suspension of E.A. is **AFFIRMED**; and, it is further **ORDERED** that Petitioner's petition is dismissed with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 6, 2023



DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Petitioner:

E.A.
B.A.

For Respondent:

Violet Capria
Kimberly Westervelt
Anthony Emering

List of Exhibits

For Petitioner:

- P-1 Certification of B.A.
Certification of E.A.
- P-2 Policy and Regulation #5530 – Substance Abuse (in place on May 12, 2022)
- P-3 Drug Screening Information
- P-4 Email correspondence
- P-5 letters from Petitioner’s counsel
- P-6 Drug Screen Results
- P-7 Policy and Regulation #5540 – Substance Abuse (effective August 17, 2022)
- P-8 Discovery correspondence with counsel
- P-9 DOT Drug Test Rule

For Respondent:

- R-1 pro se Petition of Appeal, dated 7/26/2022
- R-2 Respondent’s Answer
- R-3 Student Handbook
- R-4 Policy 5600 Student Discipline/Code of Conduct

- R-5 Policy 5600 Student Discipline/Code of Conduct
- R-6 Policy 5530 Substance Abuse
- R-7 Regulation 5530 Substance Abuse
- R-8 Policy 5610 Suspension
- R-9 Regulation 5610 Suspension Procedures
- R-10 Student Drug Testing Flow Chart
- R-11 Local State Certified Treatment Facilities
- R-12 West Essex Senior High School Student Assistance Program
- R-13 Student Reasonable Suspicion Report
- R-14 Parent Acknowledgement, dated 5/13/2022
- R-15 Physician's Statement, dated 5/13/2022
- R-16 The Doctor's Office of West Caldwell: Medical Review Officer Report, dated 5/19/2022
- R-17 Email from Principal Caesar Diliberto, dated 5/19/2022
- R-18 Out-of-School Suspension notice, dated May 20, 2022
- R-19 Parsippany HFC Lab Results, dated June 2, 2022
- R-20 Letter from High Focus Centers to Anthony Emering, West Essex High School, Dated June 7, 2022
- R-21 Email from R.R., dated 5/31/2022
- R-22 Email from B.A. with blood test results, dated 6/6/2022
- R-23 Certification of E.A., dated 9/20/22
- R-24 Certification of Anthony Emering
- R-25 Anthony Emering Resume
- R-26 Job Description Substance Awareness Coordinator
- R-27 Certification of Kimberly Westervelt
- R-28 Resume of Kimberly Westervelt
- R-29 Resume of Violet Capria
- R-30 E.A. grades, produced by B.A.
- R-31 E.A. transcript
- R-32 Petitioners' response to discovery requests
- R-33 Policy 8330 Student Records
- R-34 Regulation 8330 Student Records
- R-35 E.A. report card 2021-2022

