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DECISION

OAL DKT. NO. EDS566-05

AGENCY DKT. NO. 2005-9757

L.U. o/b/o A.P.,

Petitioners,

v.

TOWNSHIP OF PEMBERTON BOARD

OF EDUCATION,

Respondent.

Jamie Epstein, Esq., for petitioners

Frank P. Cavallo, Jr., Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: February 14, 2005 Decided: February 15, 2005

BEFORE **DONALD J. STEIN,** ALJ:

STATEMENT OF THE CASE

A.P., a student at Pemberton Township High School, through her parent L.U., contends that her removal from school for more than ten days constituted a change in placement, and therefore she is entitled to immediately return to the Pemberton High School. Respondent alleges that because she was a student disciplined for drug use, or refusal to submit to a drug test, the school can order a change of placement for up to forty-five days.

PROCEDURAL HISTORY

On February 4, 2005, an expedited due process hearing was filed by the Petitioner. The matter was transferred to the Office of Administrative Law ("OAL") (Trenton) on February 7, 2005. On February 14,

2005, a hearing was conducted and the record closed.

STATEMENT OF FACTS

A.P. was born on August 19, 1988 and has been classified as Multiply Disabled. Her psychological assessments include poor developmental skills in interaction with adult authority figures which may be a primary reason for poor performance. She has been suspended approximately five times before January 2005.

The respondent has adopted a comprehensive Substance Abuse and Awareness Policy and Pupil Discipline Policy in accordance with regulations issued by the State Department of Education (R-1). All parents received an information packet prior to the start of the school year containing these policies (R-2). The Substance Abuse Disciplinary Code states that following a suspension, the student is to remain drug free.

On January 4, 2005, a female student advised the petitioner's guidance counselor that she, the Petitioner and another student, were smoking pot before school began. Pursuant to school policy, the guidance counselor advised school officials and the substance abuse counselor ("SAC"). The SAC looked for the other students and found Petitioner in the bathroom. Upon entering the bathroom, the SAC heard snorting that she believed indicated students were ingesting a controlled dangerous substance ("CDS"). A.P. was evaluated and a substance abuse evaluation behavior and appearance checklist was prepared (R-1). The form indicated that A.P. had glassy eyes, a constant runny nose, was nervous and paranoid, and was uncooperative (R-3). At this point, school officials believed A.P. was under the influence, and the petitioner was asked to submit to a drug test pursuant to school policy. She refused the test and was suspended for ten days in accordance with respondent's policy. A manifestation determination conference was held after this incident and it was concluded that A.P.'s drug use and refusal to submit to a drug test was not the result of her disability.

A.P. was eligible to return to school on January 20, 2005, but failed to supply a medical report that she was mentally and physically fit to return to school pursuant to the Board of Education ("BOE") policy. On January 24, 2005, A.P. returned to school with the requisite doctor's note and returned to class (P-1).

On January 27, 2004, a school security officer observed a group of girls in the bathroom smoking and instituted the school's drug abuse policy. Another substance abuse behavior and appearance checklist was prepared which indicated that A.P. was trembling, nervous and paranoid, had sudden

outbursts, was crying, had sudden drastic mood swings, was defensive, and was out of control physically and emotionally (R-4). Another student observed A.P. smoking marijuana in the same bathroom on January 27, 2005. At that point, school officials believed that A.P. was under the influence and requested that she submit to a drug test. She refused. Because this was a second offense, A.P. was suspended for twenty days in accordance with Pemberton's policy (R-5). A manifestation determination conference was scheduled for February 9, 2005 (R-6). However, the conference was adjourned, because L.U refused to participate. The conference was not rescheduled.

Although no reports or Individual Educational Plans (IEP) were submitted into evidence, there were no factual disputes. The preceding information is undisputed and is thus **FOUND AS FACT**.

I also **FIND** that respondent's action in requesting the drug test were proper. Petitioner had already been suspended and subject to random drug testing as part of the requirement to be "drug free" (R-2). The record contains sufficient evidence of possible drug use that should be immediately addressed.

CONCLUSIONS OF LAW

N.J.A.C. 1:6A-12.1(e) provides that the judge may order emergency relief pending issuance of the decision in the matter or, for those issues specified in *N.J.A.C.* 1:6A-14.2(a), may order a change in the placement of a student to an interim alternative educational setting for not more than 45 days in accordance with 20 *U.S.C.* ? 1415(k)(2), if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

It is necessary to examine the law and regulations applicable to the removal of a student with a disability from a current educational placement in order to determine if respondent herein has complied with these requirements. The determination to remove A.P. from Pemberton High School may amount to the imposition of discipline and may be considered to be a change in her program and placement for which there must be a manifestation determination prior to any change in A.P.'s IEP program and placement. For disciplinary reasons, school officials may order the removal of a student with a disability

from his or her current educational placement for up to 10 days in a school year. *N.J.A.C.* 6A:14-2.8(a). A manifestation determination is required any time the school is considering removing a child with a disability from his or her educational placement for more than ten days in a given school year when it is deemed a change in placement. 20 *U.S.C.* ? 1415(k) (4). The procedures to be followed are that the determination is to be made by the IEP team and other qualified personnel, and is to be made immediately, if possible, but no later than 10 school days after the date on which the decision to take that action is made. Parental notification of disciplinary action and all other procedural safeguards are to be followed. In considering this issue, the IEP team is to consider evaluations and diagnostic results, relevant information supplied by the parents, observations of the student, and placement. 20 *U.S.C.* ? 1415(k) (4) (6). The IEP team may determine that the behavior was not a manifestation of the disability only if in relation to the behavior: the IEP and placement are deemed appropriate; the IEP services and behavior intervention strategies were implemented; the disability did not impair the ability of the child to understand the impact and consequences of the behavior; and the disability did not impair the student's ability to control the behavior. The regulations require that immediate steps be taken to remedy any deficiency in the IEP, placement or implementation. 34 *CFR.* ? 523(f). If it is determined that the student's behavior is a manifestation of the disability, there are to be no further disciplinary removals and it is to be determined if the IEP and placement decision warrant revision. In the meantime, the school district is required to continue to provide a free appropriate public education.

In the present case, there is no dispute that respondent did not conduct a manifestation hearing. Therefore, the child must be immediately returned to school. Because the manifestation hearing did not take place, I **ORDER** that a behavioral assessment plan be immediately developed, and the behavioral intervention plan be reviewed and modified, as necessary. It is also **ORDERED** that a psychological evaluation be set up by the respondent. Since it appears that the petitioner may be involved with drugs, it is further **ORDERED** that the psychological evaluation contain a drug use component.

Petitioner also requests compensatory education for the days she was suspended. Respondent does not deny this is appropriate, and if this can not be agreed upon by mutual consent, the parties are to submit the hours already provided, as well as the hours due, within three business days.

Petitioner also requests a restraining order against respondent from attempting such punishment in the future, based on allegations of drug use. This request is **DENIED**, since each incident must be decided on a case to case basis.

DECISION

For the reasons set forth above, it is hereby **ORDERED** that petitioner's request for emergent relief to have A.P. reinstated to the Pemberton High School is hereby **GRANTED**. The school district has previously commenced compensatory home instruction for the petitioner, and it is **ORDERED** that respondent is to continue to provide home instruction for the dates of the suspensions. It is further **ORDERED** that respondent develop a behavioral assessment plan, review and modify the behavioral intervention plan, and set up an independent psychological evaluation with a drug use component.

This decision is final pursuant to 20 *U.S.C.A.* ? 1415(i)(1)(A) and 34 CFR 300.510 (2002) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 *U.S.C.A.* ? 1415(i)(2); 34 CFR 300.512 (2002). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

February 15, 2005

DATE **DONALD J. STEIN**, ALJ

bdt

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