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PENNSYLVANIA SUPREME COURT SETS THE STANDARD FOR RANDOM DRUG TESTING IN SCHOOLS

The Pennsylvania Supreme Court on November 21, 2003 decided a case which may seriously impact public school district policies on random, suspicionless drug testing of students involved in both athletic and non-athletic extracurricular activities.

In *Theodore et al. v. Delaware Valley School District*, 85 MAP 2001 (November 21, 2003), the Delaware Valley School District in 1998 implemented a policy which required all middle and high school students seeking to participate in either athletic or non-athletic extracurricular activities or requesting permission to drive to school or park in the school parking lot to sign a "contract" consenting to testing for alcohol and controlled substances. The statement of purpose in the policy explained that, with respect to student athletes and student drivers, random drug testing was needed because of the high risk of immediate physical harm to the student or those with whom he/she is playing a sport or sharing the highway. However, in the case of non-athletic, non-driving activities, the policy explained that random drug testing was needed because "[E]xtracurricular participants, whether athletes or not, are student leaders and, as such, serve as role models for their peers and for young children as well. The use of drugs and alcohol by these role models exacerbates the problem of illegal substances in our schools."

The policy set forth a detailed testing procedure, including an initial screen upon entering the activity and then random testing of five percent of the participants per month. Detailed procedures were set forth for positive tests with exclusion from the activity as the ultimate penalty. Positive tests were not disclosed to law enforcement officials and were not used to suspend or expel students from school. Additionally, positive tests were disclosed only to the parents and to school officials on a "need to know" basis.

The plaintiffs, Jennifer and Kimberly Theodore, were students at the District and were subjected to mandatory testing via their participation in extracurricular activities. Jennifer participated in the National Honor Society, Science Olympiad, and Scholastic Bowl and Kimberly participated in tennis, swimming, and track and had a parking permit. After both girls submitted urine samples in accordance with the policy, both of which were negative, they and their parents filed suit claiming that the District's policy deprived them of

their rights to be free from unreasonable searches and seizures as guaranteed by Article I, Section 8 of the Pennsylvania Constitution.¹

The District filed preliminary objections to the lawsuit asserting that the Commonwealth and the District have a compelling interest to see that public school students do not use drugs and that this general interest outweighed the students' rights under the Pennsylvania Constitution. The District did not make a particularized showing of a special need for random, suspicionless testing of the targeted students such as documentation of an actual drug problem in the District, but instead relied on the general societal interest of deterring drug use in schools.

The trial court ruled in favor of the District concluding that the policy was constitutional as a matter of law. The students appealed and the Commonwealth Court reversed the trial court ruling that the District's policy was unreasonable under Article I, Section 8 of the Pennsylvania Constitution because the District failed to articulate a special need which supported its decision to target the selected students. Both parties appealed the decision to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court ultimately ruled that the District's policy as written violated the students' right to be free from unreasonable searches as set forth in Article I, Section 8 of the Pennsylvania Constitution. First, the Court recognized that the United States Supreme Court in 2002 upheld an Oklahoma school district's policy which also required all middle and high school students participating in extracurricular activities to consent to random, suspicionless drug testing by ruling that the Fourth Amendment to the United States Constitution (which also prohibits unreasonable searches) allows school districts to conduct such tests for the general purpose of deterring drug use in schools. *Board of Educ. Of Indep. Sch. Distr. No. 92 v. Earls*, 536 U.S. 822 (2002). The *Earls* Court gave public school districts wide discretion in testing students involved in extracurricular activities and ruled that deterring drugs in schools, even when there is no documented evidence of a drug problem in the particular schools, is a sufficient reason to implement random drug testing programs. The Pennsylvania Supreme Court, however, summarily rejected the "hands off" approach in *Earls* and explained that under Pennsylvania's Constitution, students in schools enjoy greater rights and hold heightened privacy interests which are greater than those provided for in the U.S. Constitution.

The Pennsylvania Supreme Court explained that determining whether a random, suspicionless search in the public school environment is reasonable under the Pennsylvania Constitution involves balancing four factors: (1) the

¹ *Art. I, Sec. 8 states in pertinent part: "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures..."* *Urine testing is a search under the Fourth Amendment to the U.S. Constitution and the Pennsylvania Constitution. Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992).

students' privacy interests, (2) the nature of the intrusion created by the search, (3) notice, and (4) the overall purpose to be achieved by the search and the immediate reasons for conducting the search. *In re F.B.*, 726 A.2d 361 (Pa. 1999); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

With respect to the first factor, the Court found that the students had a legitimate privacy interest and that the urine testing was more than a "trivial incursion in privacy". Moreover, as to the nature of the intrusion, the Court ruled that the collection of bodily fluids as well as the chemical analysis of samples obtained is more intrusive than searches of students lockers, clothing, or personal belongings. The Court noted that the District satisfied the third prong notice requirement by providing copies of the policy and requiring signatures of parents and students.

Once the Court recognized that the urine testing was more than a minimal invasion of privacy, it turned to the overall purpose to be achieved by the program. The Court noted that the policy's statement of purpose: stemming the risk of immediate physical harm caused by student athletes and student drivers taking drugs and holding up other participants as role models to non-participating students was understandable, however, the means chosen to effectuate that general policy was unreasonable. The Court focused on the fact that, up to that point, the District offered no evidence to believe that a significant drug problem actually existed in its schools or that there was a drug problem within the targeted student groups. Moreover, the Court found that the District offered no evidence to establish that the program would actually further the stated purposes. For example, the Court reasoned that, the policy targeted those student groups which were the least likely to use drugs and ignored those students which were most at risk for drug use (i.e., disenfranchised, uninvolved students). Accordingly, the Court found that the under-inclusive and over-inclusive means chosen by the District were not an effective manner of addressing its generic concern of deterring student drug use.²

This case makes it clear that school districts seeking to implement random, suspicionless drug testing policies must be able to identify and document an actual drug problem within the school district and that the proposed policy targets the appropriate student groups or otherwise is tailored to effectively deal with the documented drug problem. Random, suspicionless drug testing policies that seek to deter general drug use by students or allow testing of students merely because they are "role models" or are not specifically tailored to combat a documented problem would likely be struck down as unconstitutional under the Pennsylvania Constitution. Please keep in mind that this case does not impact the established law regarding a school district's

² *The Court emphasized that if the District should be able to provide evidence of a specific drug problem within the targeted student groups, and that the procedures set forth in the policy would effectively address the problem, then the policy as written may pass constitutional muster.*

right to conduct random, suspicionless locker searches or searches for weapons (i.e., use of metal detectors). The Court in this case ruled that a school district need not establish a special need or a documented weapons problem within its schools in order to justify a random, suspicionless search for weapons. The Court aptly reasoned that the need to ban weapons entirely from the school environment is obvious and that schools are “not required to wait for a tragedy to occur within its walls to demonstrate that the need is immediate.” *Id.*

Districts that have random drug testing policies in place should revisit their policies to determine whether they meet the standards as articulated in *Theodore*. Additionally, it is crucial that any discussions regarding the implementation of a random drug testing policy should include an evaluation of the actual drug problem in the schools, the particular groups of students involved in the drug activity and whether the proposed policy is tailored to effectively deal with the problem.