

Legal Corner

Student Drug and Alcohol Testing

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On November 20, 2003, the Pennsylvania Supreme Court issued a decision in *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2003), permitting a lawsuit challenging the school district's drug and alcohol testing policy as being unconstitutional under the Pennsylvania, rather than the Federal, Constitution. The effect or consequences of the decision have been erroneously reported in some instances. Consequently, it is important to make sure that school administrators are aware of the exact parameters of the decision — what is permissible and what is not permissible by way of student drug and alcohol testing.

The Facts

The Delaware Valley School District adopted a policy authorizing random, suspicionless drug and alcohol testing of students seeking parking permits or participating in voluntary extra-curricular activities. The policy was quite extensive and dealt with a number of issues. For example, it provided that students must submit to testing initially when they register for an extra-curricular activity or apply for a parking permit. The school district randomly tests five percent of the targeted students on a monthly basis. Random testing is unannounced and occurs throughout the school year. The selection of students is accomplished by a scientifically valid method. There are procedures for how the testing is to be carried out and how a "positive" test result will be scrutinized in order to ensure that it is a valid positive result. Confidentiality of test results is provided for, and the consequences to a student who fails the test are addressed in the policy. For example, a student who tests positive for the first time must participate in a drug assistance program, must submit to weekly testing for six weeks and is suspended from athletics, club events and performances and/or parking privileges for a period of time. In addition to requiring suspicionless, random drug and alcohol testing, the policy also required initial testing, unreasonable suspicion testing, return-to-activity testing and follow-up testing.

The policy required parents and/or students to sign a "contract" consenting to testing for alcohol and controlled substances. The policy also set forth the purposes of the policy. It provided, *inter alia*, the following:

"As representatives of the school district and leaders of their schools, students involved in extra-curricular programs and students who drive to school are expected to exemplify high standards by the public and are held in high esteem by other students. Participants in extra-curricular programs and those who drive to school are expected to perform the responsibilities accompanying these opportunities.

Deterring drug use by school students is important. School years are the time when the physical, psychological and addictive effects of drugs are most severe. The effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, because the educational process is disrupted.

With regard to school athletics and student drivers, the risk of immediate physical harm to the drug and alcohol user or those with whom he/she is playing a sport or sharing the highway is particularly high. Apart from psychological effects, which include impairment of judgment, slowing of reaction time and a lessening of the perception of pain, alcohol and the particular drugs screened by this policy pose substantial physical risks to

athletes and drivers. Extra-curricular 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...."

Legal Analysis

Two students who participated in extra-curricular activities challenged the suspicionless, random search provisions of the policy. It is unclear from the decision whether they were challenging any of the other testing, such as initial testing, reasonable suspicion testing, return-to-activity testing or follow-up testing. It is also unclear from the decision whether the plaintiffs were challenging the means and methods by which the tests were actually conducted. Moreover, the plaintiffs challenged the suspicionless, random testing under the Pennsylvania Constitution, not the Federal Constitution. In that regard, Article I, Section 8, of the Pennsylvania Constitution provides:

"The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

It is presumed that the plaintiff filed the lawsuit only under the Pennsylvania Constitution because the United States Supreme Court had issued decisions under the Federal Constitution upholding different types of drug and alcohol testing of students, including suspicionless, random testing. In *Vernonia School District v. Acton*, 515 U.S. 646 (1995), the United States Supreme Court upheld suspicionless, random drug testing which targeted students engaged in voluntary interscholastic athletics. Subsequently, in *Pottawatomie County Independent School District v. Earls*, 536 U.S. 822 (2002), the United States Supreme Court upheld a school district policy requiring all middle and high school students who would participate in extra-curricular activities to consent to random, suspicionless drug testing. Under these decisions, the United States Supreme Court decided that the drug problem at schools generally was sufficient justification for the policies.

Because of the precedent under the United States Constitution, the plaintiffs in *Theodore v. Delaware Valley School District* argued that the Pennsylvania Constitution afforded a greater measure of protection than did the Fourth Amendment of the United States Constitution. The Pennsylvania Supreme Court agreed. Unlike the analysis applied by federal courts under the Federal Constitution, the Pennsylvania Supreme Court held that the appropriate test under the State Constitution to determine the constitutionality of student drug and alcohol testing involves balancing four factors: **(1)** The students' privacy interests; **(2)** The nature of the intrusion created by the search; **(3)** Prior notice to the student; and, **(4)** The overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search. Discussing these four factors, the court concluded that the policy adopted by the Delaware Valley School District *might* be violative of the Pennsylvania Constitution. The court did not rule that the school district's suspicionless, random testing policy was unconstitutional, but made it clear that an evidentiary record had to be created to determine whether the policy met constitutional standards. Because of the procedural posture of the case by the time it got to the Pennsylvania Supreme Court, no factual record had yet been created.

Viewed in this light, the kind of policy adopted by the Delaware Valley School District may or may not be constitutional — we will have to wait and see how the litigation plays out. Moreover, even if the plaintiffs are successful in the litigation, the litigation does not appear to affect when or under what circumstances other kinds of drug and alcohol testing can take place. The case reaffirms prior decisions of the court, such as *In re: F.B.*, 726 A.2d 361 (Pa. 1999), cert. den'd, 528

U.S. 1060 (1999) (where the Pennsylvania Supreme Court upheld suspicionless searches of students for weapons), and, in *Commonwealth v. Cass*, 709 A.2d 350 (Pa. 1998), cert. den'd, 525 U.S. 833 (1998), (where the Pennsylvania Supreme Court approved of a general and suspicionless search of all student lockers for evidence of drug use). These decisions remain "good law."

Although the Pennsylvania Supreme Court did not make a determination as to whether Delaware Valley School District's policy was constitutional or not, in its discussion of the state constitutional right of privacy, the court emphasized two factors. First, the court emphasized that there must be a specialized need to test for drugs and alcohol because of an existing drug or alcohol problem. In other words, the drug and alcohol problem experienced by schools in general is not a sufficient reason to have suspicionless drug testing at a particular school. Second, the court emphasized that the determination of a targeted group for testing must have a rational basis. The court believed that the targeted group in this case may not be the ones with the drug problem that needed to be addressed. The court stated that : "[e]ven if bootstrapping from a general perception of a youth drug problem in America warrants an assumption that some general drug problem exists in every school district, the under-inclusive and over-inclusive means chosen by the district here are not an efficacious manner of addressing that generic concern." In other words, testing students in the Chess Club, the National Honor Society or the Debating Club, may do absolutely nothing to deter drug use, according to the Supreme Court.

From the perspective of school principals and assistant principals, there are a variety of angles from which you must assess drug and alcohol use by students in your schools. First, make sure you are aware of what school district policies are and what you must do to properly implement them. Second, drug and alcohol testing based upon reasonable suspicion is perfectly permissible and is not precluded by either the Federal or State Constitution. However, such testing must comply with constitutional requirements. Therefore, it is important that you or someone else who will determine whether there is "reasonable suspicion" that a student has taken drugs or alcohol or is under the influence of drugs or alcohol is properly trained to make that determination. Third, the collection and testing techniques and procedures must meet strict standards. I usually recommend to school districts that they use the same collection and testing techniques and procedures as are required for drug and alcohol testing of school bus drivers. Those techniques and procedures have passed judicial scrutiny. Fourth, if you want to push for suspicionless drug and alcohol testing, I recommend that you develop a thorough and accurate record to establish a need for such a policy by keeping records as to the prevalence of drug or alcohol usage and/or its effects in the school and that you establish a factual record that the methods used by the school district to deal with such drug and alcohol usage or effects have been ineffective at solving the problem. Finally, you must also carefully consider who the target group for suspicionless testing will be. It is only if the school board is armed with such information that its adoption of a policy allowing suspicionless drug and alcohol testing may pass constitutional muster.

Bottom-line, drug and alcohol testing is not to be undertaken lightly — it involves and implicates constitutional protections.

Related Matters

A case is currently pending in the Court of Common Pleas of Luzerne County captioned *Giambra v. Wyoming Area School District*. In that case, the school district adopted a policy regulating drug and alcohol use by students outside of school. The policy states that "the use of drugs or alcohol by students shall not be tolerated by the district at any time, regardless of where or when the illegal use of drugs or alcohol occurred." After outlining the reason for the policy, the policy stated that:

"Any student of the district who engages in the illegal utilization of and/or abuse of alcohol or drugs at any time, or any student who participates in an event or party where such alcohol or drugs are being illegally utilized or abused, shall be subjected to the disciplinary measures discussed herein. This policy shall be enforceable at all times regardless of whether the activity occurred during school related time, or outside of school related time, including summer vacation, holidays or weekends. This policy shall be enforceable regardless of whether the activity occurred inside or outside of the areas generally known as the areas comprising 'school jurisdiction' as defined by the district's drug and alcohol policy."

With respect to discipline, the policy indicated that a student who violated the policy may be precluded from participating in any and all school district sponsored extra-curricular activities, sporting and social events, etcetera, or may be dismissed from athletic teams.

The plaintiff student in this case allegedly was present at a party outside of school and unrelated to school where underage drinking allegedly occurred. As a result, the student was suspended from extracurricular activities, social activities and participation in athletic events for allegedly violating the policy. There is a dispute as to whether the student was actually barred from participating in school-sponsored events. As a result of the sanctions imposed, the student filed the lawsuit seeking an injunction permanently restraining the defendant from suspending her and asking that the policy be declared unlawful and unconstitutional. Among the arguments being made is an argument that Section 1317 of the School Code restricts the school district from imposing discipline for conduct that occurs outside of school. The plaintiff points to the provision in Section 1317 of the School Code that allows discipline for conduct with respect to students "during the time they are in attendance". *24 PS § 13-1317*. The plaintiff also relies upon the language in Section 510 of the School Code that states that the court may adopt and enforce reasonable rules regarding the conduct and deportment of pupils "during such time as they are under the supervision" of the school district. Consequently, the plaintiff argues that there is no statutory authority to control out of school conduct.

The plaintiff ignores however, another section of the School Code that expressly authorizes additional rules and contains a different standard for controlling conduct with respect to extra-curricular activities. Specifically, Section 511 of the School Code provides that:

"The board of school directors in every school district shall prescribe, adopt and enforce such reasonable rules and regulations as it may deem proper, regarding the management, supervision, control or prohibition of exercises, athletics or games of any kind, school publications, debating, forensic, dramatic, musical and other activities related to the school program, including raising and dispersing funds for any or all such purposes and for scholarships and the organization, management, supervision, control, financing, or prohibition of organizations, clubs, societies and groups of the members of any class or school, and may provide for the suspension, dismissal or other reasonable penalty in the case of any appointee, professional or other employee or pupil who violates any of such rules or regulations." *24 PS § 5-511*.

As can be seen from this provision, there is no restriction that the rules pertain to the time that the student is actually at school or participating in school activities.

This case is at the early stages of the litigation and is not expected to be concluded for a couple of years. However, the school district reports that its policy has been extremely effective at reducing the incidents of underage drinking and the students take seriously the risk that they face if they violate the school district's policy. This may be a useful tool for school districts that may be having problems with underage drinking in their communities.

