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PILLSBURY WINTHROP SHAW PITTMAN LLP
THOMAS V. LORAN III #95255
MARLEY DEGNER #251923
50 Fremont Street, Fifth Floor
San Francisco, CA 94105
Telephone: (415) 983-1000
Facsimile: (415) 983-1200

MICHAEL T. RISHER #191627
American Civil Liberties Union Foundation
of Northern California
39 Drumm Street
San Francisco, California 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SHASTA

UNLIMITED JURISDICTION

BENJAMIN BROWN, a minor, by and through his parent and guardian *ad litem*, DEBORAH BROWN, *et al.*,

Plaintiffs,

vs.

SHASTA UNION HIGH SCHOOL DISTRICT, *et al.*,

Defendants.

Case No. 164933

STUDENT PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: May 4, 2009
Time: 8:30 AM
Dept: 4
(Honorable Monica Marlow)

Action Filed: December 5, 2008
Trial Date: None set

I. INTRODUCTION.

The District's Opposition ("Opp.") demonstrates that the District decided to start testing students involved in activities such as band and Future Farmers of America ("FFA") not because of any actual need for an expanded drug testing program (the "Policy"), but because it believes that mandatory drug testing by monitored urinalysis is a "less than negligible intrusion" into student privacy. Opp. at 11; accord, *id.* at 5, 7; Loran Decl., Exhibit B, SUHSD Deposition (hereafter "DEP."), 371:12-380:2. Because the District fails to appreciate that mandatory urinalysis affects privacy, it is willing to force the Policy upon its students without any evidence that students in band, choir, or FFA are at any greater risk for using drugs than are students not involved in such activities, or any evidence that random drug testing produces any actual benefits.

Yet California courts have held this type of drug testing *does* constitute a significant intrusion into privacy that our constitution explicitly protects, and that the government cannot impose this type of program without showing a need to do so. No California case has upheld such an intrusive program, and the California Attorney General has concluded that drug testing high school students who are not athletes for reasons not reasonably related to the purposes sought to be achieved by the school-sponsored activities that give rise to the drug testing violates the California Constitution. 62 Ops. Cal.Att.Gen. 344 (1979).

Because the District cannot meet its burden of justifying the intrusion into student privacy, and because the Student Plaintiffs face irreparable harm to their privacy and education, this Court should preliminarily enjoin the District from forcing them to provide urine samples or from punishing them in any way for refusing to submit to suspicionless urinalysis.

II. FACTS.

The District presents no data on the rates of drug use among its students. Instead, it cites to anecdotal evidence – much of it hearsay – that suggests that some number of the District's 4,600 students use drugs or alcohol. Opp. at 1-2, 21. Nowhere does it suggest that students in band, choir, FFA, or any other activity use drugs at a higher rate than do other students – indeed, it repeatedly claims that "[i]t makes no difference whether you are in a club or not when it comes to use of drugs and alcohol." Opp. at 21. Nothing suggests that any of the Student Plaintiffs uses drugs. To the contrary, they all declare that they do not, and Jesse's drug test results were negative for any controlled substance. Brittany Decl. ¶ 6; Ben Decl. ¶ 14; Jesse Decl. ¶ 11, *id.*, Exhibit A.

Although the District claims that urinalysis does not infringe on student privacy and is not coercive, the uncontested evidence from students who have been ordered to provide urine samples belies this. See Student Plaintiffs' Memorandum of Points and Authorities ("Opn. Mem.") pp. 7-8; Supplemental Declaration of Brittany Dalton (hereafter "Supp. Brittany Decl.")[1]; Jesse Decl. It is particularly disturbing that armed Deputy Sheriffs are actively involved in the testing procedure, and that when Jesse refused to give a sample he was threatened with removal from his biology class and publicly embarrassed by an assistant principal. Jesse Decl. ¶¶ 5-7; see also Supp. Loran Decl., Exhibit A, Deposition of James Cloney (hereafter "CLONEY DEP."), 33:2-15. This type of negative interaction between students and school administrators can partially explain why published research has shown that "students in schools with drug testing programs had significantly poorer attitudes towards their school than did those in schools without drug testing." Taras Dec. ¶ 16(v) (citing Goldberg (2003)).

It is also troubling that the Policy is applied so unevenly, despite the fact that the District acknowledges the importance of implementing it in a uniform manner. CLONEY DEP., 26:5-8. For example, after Jesse refused to be drug tested, he was ultimately allowed to test at the testing company three days later. Jesse Decl. ¶¶ 6, 8. But when Brittany was called for testing and she and her father offered to have her tested that same day at that same company, the request was denied. Supp. J. Dalton Decl. ¶ 6; Supp. Brittany Decl. ¶ 7. As a result of this disparate application of the Policy, the District will prohibit Brittany from playing her flute in a statewide competition on May 10 unless this Court issues a preliminary injunction. Supp. J. Dalton Decl. ¶ 7; Supp. Brittany Decl. ¶ 11.

III. ARGUMENT.

A. The District's Suspicionless Drug Testing Program Violates Article I, § 1.

1. The District's Contention that the Invasion of Privacy is "Negligible to Non Existent" is Contrary to the Facts and to California Law.

The District's discussion of whether the Policy violates Article I, Section 1 focuses on a pair of U.S. Supreme Court cases, *Earls* and *Vernonia.* Both of these cases were decided solely under the Fourth Amendment, and their conclusions are inconsistent with California constitutional and statutory law. Further, the *Earls* opinion was limited to

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[1] This supplemental declaration and two supplemental attorney declarations (Supplemental Loran and Degner Declarations, filed herewith) are submitted for rebuttal.

extracurricular activities, whereas the Policy here applies to students because of their involvement in curricular activities, such as Symphonic Band, where the competitions that subject a student to drug testing are a mandatory and are a graded aspect of the course. Supp. Degner Decl., Exhibit B, District Course Catalog at p. 39. Jesse was threatened with removal from his biology course if he did not submit to random urinalysis. Jesse Decl. ¶ 6.

The District repeatedly emphasizes that the majority in *Earls* and *Vernonia* considered the intrusion occasioned by mandatory urinalysis for drug testing to be "negligible" or "less than negligible," and thus claims that the privacy intrusion occasioned by its testing program is "negligible to non-existent." Opp. at 5, 7, 11. California courts have not agreed. In *Kraslawsky*, for example, the monitoring was less invasive than what District students must endure – the employee entered a bathroom, fully clothed, while a nurse stood outside the bathroom door. *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 184 n.2, 193. The employer defended its program by arguing that "unobserved testing is not actionable under *Hill* because it is at most a slight, not serious, intrusion." *Id.* at 193. But the court rejected this argument and held that this procedure violated Kraslawsky's privacy rights under Article I, Section 1. *Id.* Similarly, in *Loder* a nurse stood outside the restroom during a routine medical examination, but a majority of our Supreme Court rejected the argument that this intrusion was insignificant. *Loder v. City of Glendale* (1997) 14 Cal.4th 846 at 897; *id.* at p. 917 (conc. and dis. opn. of Mosk, J.), *id.* at p. 919 (conc. and dis. opn. of Kennard, J.). Our state constitution, unlike the Fourth Amendment, recognizes that being forced to urinate while a monitor lurks outside the stall and listens is a serious violation of privacy, and this may be even more so for some teenagers, whose bodies are still developing, than for the adults at issue in *Kraslawsky* and *Loder*.

Citing *Vernonia*, the District also claims that a school can force its students to provide urine samples because it acts as a parent, *in loco parentis*. Opp. at 5. Once more, California law is contrary. Our high court has rejected the notion that this common law doctrine can justify an invasion of student privacy. *In re William G.* (1985) 40 Cal.3d 550, 560; *id.* at 565-66 & n.16. Nor does *Vernonia*'s statement that all fifty states require vaccinations help the District: California law allows parents to opt their children out of such vaccinations. Educ. Code § 48216; Health & Safety Code § 120365. *Earls* and *Vernonia* are both based on a view of schools, and of individual rights, that is quite different, and much less protective of student rights, than what California law requires.

When defendants do turn to California law, their analysis is flawed. The attempt to justify monitoring students' off-campus behavior by claiming that schools have "a duty to supervise at all times the conduct of the children" is a misstatement of the law that omits a crucial qualifier. Opp. at 9, citing *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 934. In reality, *Hoff* said that schools have a duty to supervise their students' conduct only when those students are "on the school grounds," and therefore held that the school was not responsible for students' off-campus behavior. *Hoff*, 19 Cal.4th at 934. A school's authority to monitor or control what students do at home or on weekends is limited. Educ. Code § 44808; *Hoff*, 19 Cal.4th at 940 n.7. And, contrary to what the District believes, schools cannot force students to undergo physical examinations over a parent's objection. Educ. Code §§ 49451, 48980(a). Nor can a school exclude students whose families object to such examination unless the school has evidence that the individual child poses a risk to the health of other students. *Id.* § 49451.[2] Finally, that a school may be liable if it negligently allow a non-student to come onto its campus and assault a student in the locker room in no way suggests that the District can force its students to go in a bathroom and pee in a cup. Compare Opp. at 11 with *Leger v. Stockton Unif. School Dist.* (1988) 202 Cal.App.3d 1448. The District's misinformed invocation of these principles, far from supporting its position, suggests that it fails to understand or to respect the privacy rights of its students in more areas than just its new drug-testing program.

2. The District has Failed to Carry its Burden of Proving "as an affirmative defense, that the invasion of privacy is justified."[3]

The District next argues that its need for the Policy outweighs the "minimally [sic] intrusiveness into a student's" privacy, citing *Earls* for the proposition that the program is justified by the federal "war against drugs." Opp. at 7, 13. But our constitution requires evidence, not just rhetoric, to justify an invasion of privacy. *Hill*, 7 Cal.4th at 40 (defense must plead *and prove* justification). And the District's evidence – consisting solely of Dr. DuPont's declaration, which cites no academic studies on the effectiveness of drug testing and relies solely on excerpts from his own inadmissible, unpublished research – is not convincing.

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[2] The statute that the District cites as allowing it to exclude "children of filthy or vicious habits" was repealed five years ago. Opp. at 9 (citing former Educ. Code § 48211).

[3] *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.

Dr. DuPont's claim that drug testing reduces student drug use contradicts not only all of the published research that Dr. Taras discusses, but also the District's own deposition testimony. The District has conducted suspicionless testing of athletes for over 10 years. DEP 207:15-23. If this testing had any effect, drug use among athletes would be less than that of other students. But this is not the case. The District's drug-diversion program counselor testified about the factors that put students at risk for drug abuse; a suspicionless drug testing program was not one of them. Supp. Degner Decl., Exhibit A, SUHSD Deposition (hereafter "DIST. DEP."), 319:9-320:5. Nor does the fact that a District student is an athlete, and therefore subject to suspicionless drug testing, have any bearing on whether that student would use drugs. *Id.* 319:1-8; see *id.* 294:1-7. None of the Districts' witnesses suggested that the suspicionless testing of athletes had in any way decreased their use of drugs or alcohol. If random drug testing had the dramatic effects that Dr. DuPont claims, the District's drug counselor, or somebody in the District, would have noticed. *Cf.* CLONEY DEP 135:19-136:9 (no evidence of any effect of new program "at this point").

The DuPont declaration also contradicts findings of the California Legislature. In 2004, both houses of our legislature passed S.B. Bill 1386 in order to "to ban the costly and ineffective practice of random, suspicionless drug and alcohol testing" in schools, based on the "express and inalienable right to privacy under Section 1 of Article I."[4] The legislature specifically found, based on many of the same reports that Dr. Taras discusses, that random, suspicionless drug testing "is not an effective deterrent to drug use by pupils," impairs trust and cooperation, and wastes money that could better be used for drug education and prevention. The governor vetoed the bill on the grounds that the legislature should not set statewide policy for schools, but did not disagree with these findings. The legislative findings are thus entitled to considerable weight.[5]

Finally, evaluating whether this privacy invasion is justified under Article I, Section 1 requires an examination not just of the deterrent value of suspicionless drug testing, but also of evidence of the magnitude of the problem that the Policy is meant to

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[4] The full text of the bill is available on the legislative website, at http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1351-1400/sb_1386_bill_20040823_enrolled.html.

[5] See *Johnson v. Calvert* (1993) 5 Cal.4th 84, 95; *In re Marriage of Bouquet* (1976)16 Cal.3d 583, 589-91 (relying on resolution adopted by legislature without governor signature). The veto message is available at http://gov.ca.gov/press-release/2782/.

address. This would require evidence of the current levels at which students use the various drugs on the District's list of tested drugs. The District has not presented **any** such data, and it appears not to have any. See CLONEY DEP. 144:14-150:20. Thus, even if the DuPont declaration's assertions were correct, it would not justify the District's program.

The District has the burden to prove, by a preponderance of the evidence, that its intrusion into student privacy is justified. *Hill*, 7 Cal.4th at 40; *see* Evid. Code § 115. The DuPont declaration cannot carry this burden.

3. Less Intrusive Alternatives to Suspicionless Drug Testing Are Available.

Before the *government* imposes a suspicionless drug-testing program, it is "required to show that no less intrusive alternatives [are] available." *Edgerton v. State Personnel Bd.* (2000) 83 Cal.App.4th 1350, 1361. The District's reliance on *Sheehan* for a laxer standard (Opp. at 15) is misplaced, because that case explicitly stated that the "least restrictive alternative burden" standard applied to cases "directed against the invasive conduct of government agencies rather than private, voluntary organizations." *Sheehan v. San Francisco 49ers* (2009) 45 Cal.4th 992, 1002 (citation omitted).

The District's attacks on the less intrusive alternatives discussed in plaintiffs' initial papers are not persuasive. First, the claims that suspicion-based testing creates a host of problems ignore that the District currently takes action against students based on a suspicion that they are under the influence of drugs – in fact, 90% of the students in the District's drug diversion program are there because they were caught under the influence of, selling, or possessing drugs. DEP. 66:12-68:10. And the claim that drug education is ineffective contradicts the District's testimony that the recidivism rate for students who complete its diversion program is "incredibly low." DIST. DEP. 294:15-22. The reality is that the District is simply uninterested in trying less invasive alternatives to random drug testing because it does not believe its program is invasive. See, e.g., DEP. 379:21-380:2 (testifying "I do not consider our policy an invasion of privacy . . . . what we considered, to me, is the least intrusive.").

B. Suspicionless Drug Testing of Students Violates Article I, Section 13.

As plaintiffs acknowledged in their opening brief, the Court in *William G.* based its holding on both the state and federal constitutions. Opn. Mem. at p. 15 n.20; see 40 Cal.3d at 564; *id.* at 558 n.5. But both the dissent in *William G.* and later commentators have observed that, in reality, *William G.* established a higher standard for searches than did the U.S. Supreme Court's opinion in *New Jersey v. T.L.O. In re William G.*, 40 Cal.3d at 572-

573 (Mosk, J., dissenting); Opn. Mem. at p. 15 & n.20. Specifically, *T.L.O.* did "not decide whether individualized suspicion is an essential" prerequisite to school searches. *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 342 n.8. In contrast, *William G.* squarely held that reasonable suspicion was an absolute minimum requirement for a search of a student, or a group of students, under Article I, Section 13. 40 Cal.3d at 564.[6]

"Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const., Art. I, Section 24. Our courts have repeatedly held that Article I, Section 13 is more protective than its federal counterpart.[7] Thus, that five Justices in *Earls* departed from the Court's prior analysis and upheld suspicionless drug testing does not affect *William G.*'s holding that Article 1, Section 13 requires individualized suspicion before a school searches a student. *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 561; s*ee Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 510-11; *Theodore v Delaware Valley School Dist.* (Pa. 2003) 836 A.2d 76, 89 (noting *Earl's* departure from prior law). Unless our Supreme Court revisits that holding, the schools of our state must not search students by means of mandatory urinalysis without reasonable suspicion.[8]

C. The Program Violates the Equal Protection Clause of the State Constitution

The District does not dispute that education and privacy are both fundamental interests, meriting strict-scrutiny analysis. Nor does it argue that its decision to test students

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[6] All of the other California cases that the District cites in this section of its brief (see Opp. at pp. 17-18) are irrelevant, because they are criminal cases arising after California adopted the "truth in evidence" rule, and they were decided only under the Fourth Amendment. See *In re Lance W.* (1985) 37 Cal.3d 873, 886-87.

[7] See, e.g., *People v. Mayoff* (1986) 42 Cal. 3d 1302; *People v. Laiwa* (1983) 34 Cal.3d 711; *People v. Blair* (1979) 25 Cal. 3d 640, 653-54; *People v. Brisendine* (1975) 13 Cal. 3d 528, 545, 551 ("California citizens are entitled to greater protection under the California Constitution against unreasonable searches and seizures than that required by the United States Constitution"). Although these cases are no longer relevant to criminal cases, they still define the substantive reach of the "independent and more exacting standards of article I, section 13" in civil cases. *In re Lance W.*, 37 Cal. 3d at 879, 886-87.

[8] The cases from other states that the District cites are distinguishable. *Joye* relied on data "specifically defining the scope of the schools' drug and alcohol problems" and also on the fact that the school planned to switch from urinalysis to oral-swab sampling. *Joye v. Hunterdon Cent. Regional High School Bd. of Educ.* (N.J. 2003) 826 A.2d 624, 644, 652. Similarly, the district in *Linke* presented specific evidence showing that drug use among its students was higher than in the rest of the state; the plaintiffs themselves were both involved in school athletics as well as other activities. *Linke v. Northwestern School Corp.* (Ind. 2002) 763 N.E.2d 972, 974, 976. Both cases were decided by one-vote margins over persuasive dissents. *Id.* at 987-97; *Joye*, 826 A.2d at 655-672.

involved in school-related activities while ignoring other students can withstand strict scrutiny. Instead, it claims that students who take part in activities such as band, choir, or FFA are not similarly situated to their fellow students who take part in non-competitive activities or who do not take part in any activities.

California courts have repeatedly rejected similar attempts to evade equal protection analysis. The test is not whether the two groups of students are identical – a test that would eviscerate equal protection. *In re Marriage Cases* (2008) 43 Cal.4th 757, 831 n.54. Rather, the question is "whether these two categories of individuals are sufficiently similar to bring into play equal protection principles that require a court to determine whether distinctions between the two groups justify the unequal treatment." *Id.* (citation and quotations omitted).

The groups in this case plainly are similarly situated. As Brittany's experience shows, the distinction between a student who is subject to the policy and one who is not is hard to fathom: because the District believed[9] that she had withdrawn her consent to testing, Brittany was not allowed to play her flute in the Christmas parade, because that would have been "competitive." She was, however, allowed to carry a flag in that same parade. Brittany Decl. ¶ 11; see CLONEY DEP. 139:17-141:15. Similarly, Ben Brown must test in order to participate in the choir, but he can participate in the Victorian Dinner, which Superintendant Cloney described as "a dinner musical theater production," without being subject to the testing. CLONEY DEP. 131:2-12. The two groups of students – those subject to the policy and those excluded – are more similar than are various groups our courts have held to be similarly situated for equal protection purposes. See, e.g., *Marriage Cases*, 43 Cal.4th at 831 n.54 ("same-sex couples and opposite-sex couples"); *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200; *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 950 (public and private employees and public safety officers all similarly situated).[10]

The burden thus falls on the District to show that singling out students involved in choir, band, and FFA for testing is necessary to achieve a compelling government interest.

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[9] This belief was erroneous, as Mr. Cloney has admitted. CLONEY DEP. 72:14-23.

[10] The District's reference to other requirements of participation in activities – agreeing to ride school transportation and to maintain a certain number of credits – is a red herring. Nobody disputes that schools may establish prerequisites for classes and other activities. It is only when the District imposes conditions that infringe on its students' constitutional rights that heightened scrutiny applies. The validity of the requirements that students "maintain good citizenship, . . . [and] not attend an illegal event where drug or alcohol are being served to minors" are valid is outside the scope of this suit.

Marriage Cases, 43 Cal.4th at 832. As discussed above, the District does not even claim that students involved in these activities are any more likely than are their peers to use drugs. In fact, as discussed in Plaintiffs' Opening Memorandum, these students are less likely to do so. And although Mr. Cloney now claims that students involved in Competitive Representational Activities ("CRAs") are tested because they are involved in overnight trips and dangerous activities, even this new rationale cannot justify the Policy.

First, this new justification appears simply to be a litigation strategy. It appears neither in the records of the Policy's genesis, nor in the response to an interrogatory asking why the District adopted the program. See Opn. Mem. at p. 6 (quoting interrogatory response in full). At his deposition, Mr. Cloney was asked if he could "think of any reason, putting legal analysis aside, that it would be more important to test students involved in the debate club than to test students who aren't involved in any sort of school-related activities." He responded that it was "important to test students that we are able to." He was then asked, "the reason you are testing the math team, Future Farmers o[f] America, the choir, is not because there's a greater need to select those students out for testing, it is because those are the students you are allowed to get at?" Mr. Cloney responded, simply, "True." CLONEY DEP. 132:14-19. Nowhere in his testimony on April 7th does he mention the safety concerns that feature so prominently in his April 21st declaration.

Even if this new concern were real, it could not justify the Policy. As discussed above, the distinction between a competitive activity that is subject to testing and one that is not subject to the Policy is arbitrary. Students who do not engage in CRAs participate in gym class, science-class experiments using chemicals, and overnight trips, yet they are not subject to testing. Conversely, the debate team is subject to testing even though they do not do anything physical, and regardless of whether they go on overnight trips. How does a flutist like Brittany pose any risk to her fellow band members? How could this hypothetical risk change based on whether the band is practicing or engaged in a competitive performance? How does having her carry a flag instead of playing a flute change this risk? A student on an overnight field trip as part of a history class is not subject to the Policy; but a student on an overnight trip with the math team is.

These distinctions are irrational – whether or not an activity is "competitive" has nothing to do with whether students engaged in it are at any increased risk of being involved with drugs or in posing a danger to themselves or others if they are impaired.

Thus, the District's decision to test students involved in CRA's violates equal protection. *Hofsheier*, 37 Cal.4th at 1199; *Long Beach City Employees Assn.*, 41 Cal.3d at 955-56.[11]

IV. CONCLUSION.

"'No one would want to live in an Orwellian world in which the government assured a drug-free America by randomly testing the urine of all its citizens." *Hill*, 7 Cal.4th at 55 (citation omitted). Although the District is not testing all of its students, it is testing more than half of them. And it is doing so not because it has some particular drug problem, or because it has any particular need to test the students who are covered under the Policy. Instead, it is testing everybody it thinks it can test without jeopardizing its federal grant. To say that the District can test the three student plaintiffs in this case is to say that any school in California can test any student, without any suspicion or any limitation. And because every minor in our state has a duty as well as a right to attend school, this would effectively mean that everybody in our state would be subject to mandatory urinalysis for the purposes of drug testing during his or her formative years.[12]

The District has not disputed that the students will suffer irreparable harm if this Court does not issue a preliminary injunction. Nor has it even suggested that a limited injunction would harm its interests in any way. This Court should therefore grant preliminary relief to protect the Student Plaintiffs' rights pending a final decision in this case. *Robbins v. Superior Court* (1985) 28 Cal.3d 199, 205-06.

Dated: April 27, 2009.

MICHAEL T. RISHER
PILLSBURY WINTHROP SHAW PITTMAN LLP

By: Thomas V. Loran III
Attorneys for Plaintiffs

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[11] The case that the District cites as raising an "identical issue" is irrelevant. See Opp. at 19 (citing *Citizens for Parental Rights v. San Mateo County Board of Educ.* (1975) 51 Cal.App.3d 1). Plaintiffs in that case claimed that because they were allowed to opt out of a sex-education class, they were denied equal protection because they would then not participate in that same class. 51 Cal.App.3d at 27. The court held that there was no "state action" because the school had not excluded the students from anything – the students had opted out of sex ed. *Id.* Here, the District is excluding students from educational activities unless they submit to a urine test. That they might have chosen to forgo these activities does not strip them of their rights to equal protection. *Long Beach City Employees Assn.*, 41 Cal.3d at 950-51.

[12] Educ. Code § 48200; *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074. Exempt would be only those with the resources and desire to attend private schools.