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
Fascimile: (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' MEMORANDUM OF POINTS AND AUTHORITIES 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes and Codes

Other Authorities

I. INTRODUCTION.

Pursuant to a policy adopted by its Board of Trustees ("Board"), the Shasta Union High School District (the "SUHSD" or "District") has begun requiring that any student who wants to participate fully in certain classes and in certain cocurricular and extracurricular activities – including choir, orchestra, the math team, and Future Farmers of America – must consent to random, suspicionless urinalysis to detect prescription drugs, alcohol, illegal drugs, and tobacco. Students who are selected for testing under this program (the "Drug Testing Policy") are pulled from class, marched to a bathroom, and required to urinate into a cup while a monitor stands just outside the stall listening to them. Plaintiff Parents and Plaintiff Students[1] object to this new policy because it violates the students' rights to privacy, equal protection, education, and freedom from unreasonable searches under the California Constitution. Unless this Court acts to protect them, they face irreparable harm to their privacy and dignity and to their education.

The Student Plaintiffs are not challenging the SUHSD's testing of athletes or testing with student or parental consent, nor are they challenging a school's authority to test students based on a reasonable suspicion of drug use or possession. They are simply asking this Court to preserve the *status quo* by preliminarily enjoining the District from enforcing the Drug Testing Policy pending trial on the merits.

II. FACTS.

A. The Parties.

Plaintiffs Benjamin Brown ("Ben") and Brittany Dalton ("Brittany") are seniors at Enterprise High School. Ben and Brittany are subject to suspicionless testing under the Drug Testing Policy because they are enrolled in classes in the school's music program and take part in music performances.[2] Plaintiff Jesse Simonis ("Jesse") is a sophomore at

---

[1] "Student Plaintiffs" refers to Plaintiffs Benjamin Brown ("Ben"), Brittany Dalton ("Brittany"), and Jesse Simonis ("Jesse"), minors for whom guardians *ad litem* have been appointed – their respective parents Plaintiffs Deborah Brown, John Dalton, and Robert Simonis. Plaintiff John Dalton and Plaintiff Deborah Brown, together with her husband Plaintiff Kenneth Brown, have brought a taxpayers' suit to prevent expenditure of public funds for implementing and enforcing the Drug Testing Policy. See First Amended Complaint ("FAC"), filed April 9, 2009, ¶¶ 5-6, ¶ 9, ¶¶ 76-79. "Parent Plaintiffs" refers, collectively, to Mr. Dalton, Mr. and Mrs. Brown, and Mr. Simonis.

[2] Ben is in Symphonic Band, Chamber Choir, Jazz Band, Jazz Choir, and Enterprise Starship (a show choir that competes and performs all over the world), each of which is a graded class and satisfies the visual and performing arts entrance requirements for

(continued...)

Foothill High School who is enrolled in an Integrated Agricultural Biology class. One of the requirements of that class is that students participate in Future Farmers of America (FFA), an activity that subjects Jesse to the Drug Testing Policy. Jesse Decl. ¶¶ 3-5.[3]

Defendants are the District, the Board, and the five current Board members and current District Superintendent James Cloney (all sued solely in their official capacities).

B. SUHSD's Adoption in 2008 of the Drug Testing Policy.

For several years, District students involved in competitive athletics at school have been subject to random drug testing. See EX 10 at p. 10 (District's application for federal grant to underwrite Drug Testing Policy).[4] Last year, however, the District announced, in a letter sent to parents and guardians of District students in early February, that it would be expanding its drug testing program to include students other than athletes who participated in District "representational activities." EX 23. This followed Board action approving the Drug Testing Policy on January 15, 2008. See Loran Decl., Exhibit B, SUHSD Deposition (hereafter "DEP"), 202:9-203:12; EX 18, pp. 2, 5 (RES. 08-013).

At the same meeting in January 2008, the Board approved submission of a federal grant application (EX 10) to underwrite much of the cost of the Drug Testing Policy. See EX 11; EX 18, pp. 2, 5 (RES. 08-014). In its application, the District asserted that drug use rates among its students were much higher than the national average. EX 10, pp. 2-6, The

---

(...continued)
admission to the California State University and the University of California. See Decl. of Ben ¶ 3; Decl. of Deborah Brown ¶ 3. Each of these classes is thus "curricular" within the meaning of Education Code section 35160.5(a)(4), which provides that "[a]ny teacher graded or required program or activity for a course that satisfies the entrance requirements for admission to the California State University or the University of California **is not an extracurricular or cocurricular activity** as defined by this section") (emphasis added). Compare *id.* with *id.* § 35160.5(a)(2) (providing that "an 'extracurricular activity' is not part of the regular school curriculum, is not graded, does not offer credit, and does not take place during classroom time"); *id.* § 35160.5(a)(3) (providing that "a 'cocurricular activity' is defined as a program that may be associated with the curriculum in a regular classroom"). Brittany participates in Symphonic Band, Marching Band, Pep Band, and a competing flute ensemble. Decl. of Brittany ¶ 3; Decl. of John Dalton ¶ 5. Symphonic Band is a "curricular" class within the meaning of Education Code section 35160.5(a)(4). *Id.*

[3] Each of the Student Plaintiffs is a minor, one of whose parents has been appointed his or her guardian *ad litem*. See footnote 1, *supra*.

[4] "EX" followed by an Arabic number refers to a deposition exhibit. All deposition exhibits are included within Exhibit C to the Declaration of Thomas V. Loran III, filed herewith (the "Loran Declaration" or "Loran Decl."), which Declaration references (in paragraph 8) the testimony authenticating each of the proffered exhibits.

District has now admitted, however, that those claims were never verified by the Board[5] and are in fact untrue.[6] More important, the District has also admitted that the erroneous information in the District's grant application had no bearing on the Board's decision to adopt the Drug Testing Policy, which, as explained below, was based on factors **other than** a perception that drug usage among District students was more problematic than elsewhere. DEP 174:25-176:6; 400:20-401:17.

Primarily to avoid jeopardizing the anticipated federal funding,[7] the District deferred implementation of the Drug Testing Policy until the 2008 fall semester. At a Board meeting on July 15, 2008, the language of both the applicable Board Policy (EX 3) and Administrative Regulation (EX 7) regarding drug testing was modified slightly to conform to the terms of the federal grant, which by then had been awarded to the District. See EX 20, pp. 2, 4-5 (RES. 08-197).[8] As finalized by the Board, the Drug Testing Policy applies to "all students participating in [D]istrict Competitive Representational Activities." EX 3. The term "Competitive Representational Activities" or "CRAs" is defined by Board regulation to mean "[a]ll activities sanctioned by and under the control and jurisdiction of the [District] that are competitive extra-curricular or co-curricular[, that] . . . do not occur during the regular course of the school day, and include Competitive Representational Activities . . . during the summer vacation." EX 7, § 5.5.2.

C. The Factors Leading to the District's Adoption of the Drug Testing Policy.

The principal proponents of the Drug Testing Policy were Board member Stupek and former Superintendent Michael Stuart. Each was designated by the District to testify on its behalf at deposition (pursuant to Code of Civil Procedure section 2025.230). Each was designated, *inter alia*, to testify regarding the following deposition topic: the purported need for the Drug Testing Policy as applied to District students engaged in competitive representational activities other than athletics. See Loran Decl. ¶¶ 5, 7; EX 1 (topic 2).

---

5 See DEP 160:17-164:10; 172:5-173:9; 371:20-375:19.

6 See DEP 449:5-25. See generally *id.* 441:20-442:17; 445-453; 494:24-498:20.

7 See EX 19, p. 2 (minutes of March 26, 2008 Board meeting at which implementation of the Drug Testing Policy is delayed to avoid "detriment[]" to grant application).

8 At deposition, the District employee responsible for implementing the Drug Testing Program confirmed that EX 3 and EX 7 represent the current, operative versions of the Board Policy and Administrative Regulation applicable to District drug testing. DEP 79:1-17; 79:24-80:3; 81:5-11 (EX 3); *id.*, 102:16-25; 103:12-18; 104:3-16 (EX 7).

Both designees testified that Ms. Stupek had met in private with Mr. Stuart at some point within the past two years and expressed her support for expanding the drug testing. DEP 222:2-13; 222:24-223:10; 349:19-350:13. Mr. Stuart specifically remembered that Ms. Stupek had complained that she thought the music students, who were not subject to mandatory drug testing under the former District drug testing policy, were in fact using drugs, alcohol, and prescription pills. *Id.*, 222:7-8; 223:9-10.

This informal interaction led to the Board's authorizing the Superintendent to discuss expansion of the Board's drug testing policy with legal counsel. DEP 279:20-281:11; 369:11-21. Attorneys for the District produced a legal memorandum discussing United States Supreme Court Fourth Amendment precedents. EX 15.[9] However, the Board was not presented with any legal analysis regarding state law, much less any analysis of the impact of the proposed expanded drug testing policy on the right to privacy guaranteed under Article I, Section 1 of the California Constitution. DEP 193:4-15; 197:10-16; 370:6-371:19.

Following receipt of input from District counsel, the Superintendent discussed possible expansion of the District's drug testing policy with a few parents and certain staff members. DEP 205:16-209:11; 215:10-216:2. Aside from counsel, the Board did not contact any outside consultants in regard to the potential expansion of the policy. *Id.* 214:7-22.[10] Likewise, in connection with the adoption of the Drug Testing Policy, the Board gave no consideration to possible less restrictive means to accomplish the policy's goals (see *id.*, 30:3-21; 378:17-381:24) or to having a voluntary drug testing regime. *Id.* 382:4-394:13.

D. The District's Implementation of the Drug Testing Policy.

Shortly after the start of school in the 2008-2009 school year, the District sent parents an information packet that included a "Parent and Student Acknowledgment Form." completion of which was "required for students to have access to school computers and to be eligible for participation in all representational (co-curricular and extracurricular) activities." J. Dalton Decl., ¶ 7, Ex. A. The form also stated that: "[b]y signing this form

---

[9] *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls* (2002) 536 U.S. 822; *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646.

[10] Indeed, the Executive Director of the District's drug diversion program (DEP 283:1-284:25) testified that she had not been approached by the District to provide input prior to adoption of the Drug Testing Policy (*id.*, 296:4-10), nor has the District sought her input following implementation of the Drug Testing Policy. *Id.* 306:3-12.

the parent agrees to the Competitive Representational Activities Code, and authorizes their student to be included in the drug/alcohol random testing pool." *Id.*

Nothing in this information packet or any other available document specified which activities actually constitute CRAs, so parents had no way of knowing whether signing the form would subject their children to random drug tests, or whether it would simply allow them access to the school computers. In fact, the District's identification of CRAs was delayed until early 2009 (DEP 85:21-88:19), when a list of the CRAs for all three District high schools was finalized. EX 6 (two-page listing attached to Interrogatory Response after page 7). There was no option on the form for parents to allow computer access but not consent to random drug testing, and Plaintiffs Mr. and Mrs. Brown and Plaintiff Mr. Dalton signed the forms under protest. See Deborah Brown Decl. ¶ 11; John Dalton Decl. ¶ 7.

At the District's deposition, the employee responsible for implementation of the Drug Testing Policy (DEP 12:8-13:10) testified regarding the specifics of the testing protocol (*id.*, 30:22-41:7), including review, disclosure, and action upon test results (*id.*, 42:1-55:25; 60:13-63:9), record keeping (*id.*, 59:3-10; 60:11-12), and the related District drug diversion program. *Id.* 63:10-18; 66:19-68:10. This designee also acknowledged that a number of the CRAs formally identified by the District (see EX 6, attached Table of CRAs) involve activities that are teacher-graded and/or required activities and may satisfy admission requirements for the California State University and University of California. See generally DEP 85:6-88:19; 92:2-97:3. Compare *id.* with footnote 2, *supra* (discussing Education Code § 35160.5(a)).

Between the start of the school year and January, the District pulled 391 students from class and forced them to provide a urine sample while a monitor listened to the sounds of their urination from inside the restroom. EX 6, p. 6 (Defendants' Response to Special Interrogatory 7). These 391 tests yielded a total of 20 false positive results for drugs and 8 confirmed positive tests, of which only "one or two" related to students involved in non-athletic activities such as the ones at issue in this case. *Id.* (Defendants' Responses to Special Interrogatory 8, 9); DEP 304:14-305:6. The District is continuing to test students and hopes to have tested a total of 840 students before the end of the school year, although it will apparently fall short of this goal. *Id.* 31:3-14.

E. The Commencement of this Legal Challenge to the Drug Testing Policy.

Following the Board's announcement of the Drug Testing Policy, attorneys for Plaintiffs contacted the Board in July 2008 to request records related to the Board's adoption of the policy and that the Board defer implementation of the policy on the ground that it violated District students' basic constitutional guarantees. Loran Decl. Ex. D. Following a lengthy letter and e-mail exchange occurring over a period of three months (see *id.*, Exs. E-J), the Superintendent notified Plaintiffs' attorneys on November 21, 2008 that the District had declined to defer testing of the Student Plaintiffs. *Id.*, Ex. K. Accordingly, this action was filed two weeks later on December 5, 2008. Based on post-suit developments in the case, the complaint was recently amended to add a co-plaintiff and new testing allegations. See FAC ¶¶ 9-10; 39-44.

Following service of process on them, Plaintiffs propounded written discovery to Defendants, including a special interrogatory seeking identification of all facts that supported the purported need for adoption of the expanded drug testing regime reflected in the current Drug Testing Policy. See EX 6, p. 3 (Response to Special Interrogatory No. 1); Loran Decl., Ex. A (Verification). Defendants responded to this special interrogatory as follows:

> The Superintendent at the time, Mike Stuart, and members of the Board . . . felt the drug uses [*sic*] rate among . . . District students was too high and that expanding the drug testing policy beyond athletics to all competitive representational activities, in which more than half of the student body participates, would further the . . . District's goals. These goals included reducing drug use, providing those students who may be tempted to use drugs an excuse or another reasons [*sic*] for not using drugs, and providing counseling and further education to those who test positive. Input from staff and focus groups found a need to expand the drug testing policy. There were discipline events where [*sic*] students were involved in extra curricular activities were found either in possession, under the influence of and/or selling drugs or alcohol during off campus events. High School [*sic*] students were being injured and killed from drug and/or alcohol use. Further, at least three of the Board members had children involved in the . . . District after school competitive events who reported drug and/or alcohol use among participants. The Superintendent Mike Stuart had a son in the . . . District who reported drug/alcohol use among students in competitive representational activities.

At the District's deposition, Plaintiffs adduced considerable testimony regarding the factors that the Board viewed as justifying expansion of the District's drug testing policy. Specifically, despite the literal text of Defendants' interrogatory answer, the District admitted at deposition that the Drug Testing Policy was **not** adopted in response to specific, recent events within the District (DEP 217:7-218:8; 219:14-25), including the Board's not having in

mind any history of recent injuries or deaths when it expanded the testing policy. *Id.*, 220:5-11. In fact, as discussed above and in contrast to what the District had represented to the federal government in support of its grant application (EX 10), no consideration was given by the Board to how drug use by District students correlated to national trends (DEP 231:21-323:2), which the Board likewise ignored. *Id.*, 190:23-191:23; 378:12-16.

The District's position is summarized by the deposition testimony of its designees Mr. Stuart and Ms. Stupek, which was entirely consistent on this point: **any** drug usage by District students was "too much," and the Drug Testing Policy was "needed" if it allowed but a single student to "say no to drugs" that otherwise would not have done so. DEP190:23-191:23; 213:8-15; 375:8-19; 400:23-401:9. Moreover, in the District's view, mandatory urinalysis was not an invasion of student privacy. *Id.* 378:17-25; 379:14-380:2.

Plaintiffs, of course, disagree with the District's unfounded conclusions and have presented expert testimony from Dr. Howard L. Taras, a Professor of Pediatrics at the University of California and an expert in the area of school health policy and practice. Taras Decl. ¶¶ 1-2. Dr. Taras has concluded that the Drug Testing Policy does not meet most criteria for a reasonable drug public health screen, that it does not responsibly measure whether such intervention by the District could be the cause of plausible, inadvertent harm to District students, and that there is very little evidence to support its having a deterrent effect on illicit drug use by District students. *Id.* ¶ 4; see also *id.* ¶¶ 5-18.

F. Recent District Testing Initiatives that Warrant Immediate Issuance of Injunctive Relief.

Recently, two of the Student Plaintiffs – Brittany and Jesse – have been subjected to District demands that they submit to urinalysis in accord with the Drug Testing Policy. In the case of Brittany, issuance of a preliminary injunction prior to May 9 is necessary to permit her to participate in a flute competition that she has been working toward this entire school year.

On March 24, 2009, Jesse was directed to leave class and report to the school office, where a school administrator, accompanied by a sheriff's deputy, told him he had to provide a urine sample. Jesse Decl. ¶¶ 3-5. Jesse, who had never been told he was subject to suspicionless drug testing, called his mother, who removed him from school for the day. The next day, a school administrator again pulled Jesse from class to tell him that if he did not provide a urine sample he would be kicked out of FFA and Agricultural Biology class.

The day after that, this same administrator told Jesse in public if he did not take a drug test by the following day he would be kicked out of FFA. Jesse was upset that other students had heard this, and also that this was causing him to miss so much class. In order to avoid any more repercussions Jesse provided a urine sample on March 27. Jesse Decl. ¶¶ 4-9.

On April 8, 2009, Brittany called her father to report she had been pulled from her first period class and directed to submit to drug testing by the District. Supp. Dalton Decl. ¶ 4. Her father met with the Principal to object to Brittany's being tested at the school but to offer to allow her to be tested privately and to disclose the test results to the District. *Id.* ¶¶ 5-6. The Principal never responded to Mr. Dalton's offer of private testing and informed Mr. Dalton that Brittany would not be allowed to compete in any CRAs as a result of her refusal to be tested. *Id.* ¶ 6. Brittany is scheduled to participate in a state-wide flute competition on May 9, 2009 and in a parade on May 16, 2009. *Id.* ¶¶ 7-8. Unless enjoined by this Court, the District will prevent Brittany from participating in these competitions.

Jesse, Ben, and Brittany are concerned that they remain subject to being pulled from class and ordered to drug tests. The District has refused requests to suspend the program or to allow families to have their children excluded from the program. See Loran Decl. ¶¶ 9-16, Exs. D-K. A preliminary injunction is therefore necessary to protect the students' constitutional rights pending final resolution of this matter.

III. ARGUMENT.

The District's suspicionless drug testing program violates the Student Plaintiffs' right to privacy under Article I, Section 1 of the California Constitution because the District's interest in testing students not involved in athletics does not outweigh the students' privacy rights, and because there are less-intrusive means that the District could use to achieve its goals. See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1. The program further violates the Student Plaintiffs' right to be free from unreasonable searches under Article I, Section 13 of the State constitution, which prohibits school authorities from searching students without individualized suspicion of wrongdoing. *In re William G.* (1985) 40 Cal.3d 550, 563-64. Finally, because both privacy and education are fundamental rights under the California Constitution, equal protection requires that the District have a compelling reason to target students involved in competitive activities, while ignoring students who leave school when the last bell rings. See *Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal.3d 937, 948. However, testing

students involved in these activities is in fact irrational because it means that the program targets the students who are *least* likely to use drugs; it therefore violates the Student Plaintiffs' rights to equal protection under the California Constitution.

In deciding whether to grant a preliminary injunction, this Court must consider both the likelihood that plaintiffs will prevail on the merits and the harm that the parties will suffer in the absence of preliminary relief. *White v. Davis* (2003) 30 Cal.4th 528, 554. "The ultimate goal...in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause" *Id.* (citations and internal punctuation omitted). The Students Plaintiffs will likely prevail on the merits because the new program violates their constitutional rights. Without preliminary relief, they face irreparable harm: they will either have to forgo participating in the covered activities or they will have to agree to forfeit their constitutional rights and subject themselves to suspicionless drug testing. In either event, the harm cannot later be undone. In contrast, the District will suffer little harm from a limited preliminary injunction that applies only to the three Student Plaintiffs, who have never given the District any reason to think that they are using drugs.

A. Plaintiffs Will Likely Prevail on the Merits Because the Drug Testing Program Violates their Rights to Privacy, Equal Protection and Freedom from Unreasonable Searches Under the California Constitution.

1. The District's New Suspicionless Drug Testing Program Violates the Student Plaintiffs' Right to Privacy Under Article I, Section 1 of the California Constitution and Education Code Section 49451.

Article I, Section 1 of the California Constitution explicitly protects the right to privacy: "All people are by nature free and independent and have inalienable rights. Among these are...privacy." This explicit provision is more protective than are the implicit privacy protections of the federal Constitution. *In re Carmen M.* (2006) 141 Cal.App.4th 478, 491 n.11.

The California Supreme Court has examined the legality of drug testing under Article I, Section 1 in two cases: *Hill*, *supra*, which involved a private organization's decision to test college athletes for steroids and other drugs, and *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 890-91, involving the testing of government employees. These cases establish the framework for analyzing the constitutionality of such programs:

1. The plaintiff states a prima facie case by showing a legally protected privacy interest, a reasonable expectation of privacy, and conduct by the defendant constituting a serious invasion of that privacy;

2. The defendant may rebut that case by negating any of these elements "or by proving, as an affirmative defense, that the invasion of privacy is justified because it substantially furthers one or more countervailing interests;"

3. The plaintiff may then prevail "by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests."[11]

a. The District's Drug-Testing Program Seriously Invades Student Privacy.

A "drug testing program unquestionably implicates privacy interests protected by the state Constitution." *Loder*, 14 Cal.4th at 896 (lead opn. of George, J.).[12] Drug testing by urinalysis invades privacy in two distinct ways: taking the sample invades the subject's interest in keeping excretory functions private, and testing the sample invades her right to informational privacy. *Id.*; *Hill*, 7 Cal.4th at 40-41. Because the District's program involves drug testing by urinalysis, the plaintiffs have stated a prima facie case.

Moreover, the privacy intrusion here is far more invasive than in *Hill* or *Loder*. Unlike the athletes in *Hill*, the Student Plaintiffs here have not submitted to the "close regulation and scrutiny of the physical fitness and bodily condition of student athletes" where "physical examinations (including urinalysis)" are required. *Hill*, 7 Cal.4th at 41-42.[13] Debaters and singers do not take communal showers or share intimate information about their medical and physical conditions or their use of medications with fellow athletes and coaches. Cf. *id.* at 9, 41-42, 52-53.[14] Plaintiffs thus retain the same privacy rights as do any other high-school students in our state, rights which "must be respected." *William G.*, 40 Cal.3d at 563.

---

[11] *Hill*, 7 Cal.4th at 39-40; *Loder*, 14 Cal.4th at 889-98 (lead opn. of George, J.); accord, *Sheehan v. San Francisco 49ers, Ltd.*(2009) 45 Cal.4th 992, 89 Cal.Rptr.3d 594, 599-600; *Carmen M.*, 141 Cal.App.4th at 491-92 & n.13.

[12] Although there was no majority opinion in *Loder*, subsequent cases have largely adopted the reasoning of Justice George's lead opinion. *See, e.g., Carmen M.*, 141 Cal.App.4th 478; *Edgerton v. State Personnel Bd.* (2000) 83 Cal.App.4th 1350, 1360-61. Citations to *Loder* are therefore to the lead opinion unless otherwise noted.

[13] The *Hill* Court further explained that "sports competition demands highly disciplined physical activity conducted in accordance with a special set of social norms." *Id.* at 9.

[14] *Vernonia School Dist. 47J v. Acton*, 515 U.S. at 657.

The District's program is also inherently more intrusive than the programs in *Hill* or *Loder* because of the way that it is administered. In *Hill*, testing only occurred immediately after collegiate "championship events or postseason bowl games." *Hill*, 7 Cal.4th at 12. In *Loder*, testing occurred at a physician's office as part of a routine, scheduled, comprehensive medical exam. 14 Cal.4th at 854, 883-84. In neither case was anybody with whom the testee would ever later interact involved in the testing. See *Hill*, 7 Cal.4th at 12 (test administered by an "NCAA official monitor of the same sex as the athlete"); *Loder*, 14 Cal.4th at 854, 904 (Opn. of Mosk, J.) (test administered by medical personnel in physician's employ).

In contrast, under the District's program, rather than reporting to a private doctor's office or a special collection station, the students are publicly pulled from a class full of their peers by an assistant principal, who remains near the restroom while they provide a urine sample, and taken to a bathroom in their school. Although the District asserts it will maintain confidentiality of the reports, it concedes that other students will indirectly learn of a positive test when a student who was pulled from class for testing suddenly stops participating in activities. DEP 499:17-21; EX 10, p. 15. And the students here are adolescents, who may suffer embarrassment and even humiliation knowing that an adult will "hear the tinkling of their urination" and will "feel the warmth of their urine in the cup." Taras Decl. ¶ 16(ii).

The program also sweeps more broadly and indiscriminately than the testing programs in *Hill* or *Loder*. In *Hill*, only a small percentage of NCAA athletes—those who participated in championship or bowl games -- had to provide urine samples. 7 Cal.4th at 11. In *Loder*, the doctor tested the same sample that was used for routine medical screening; no employee was forced to provide a separate sample. 14 Cal.4th at 854, 883-84. In contrast, the District's program sweeps in more than half the student body by requiring that any student who wants to participate fully in classes such as band or choir provide a urine sample on demand, for no reason other than drug testing.

Finally, it is the government, not a private entity, that is infringing on privacy here. Our Supreme Court has cautioned that the threat to privacy is more serious where the government is involved, particularly where an important government service such as education is involved. *Hill*, 7 Cal.4th at 38-39, 42-43; *id.* at 59-60 (Kennard, J., concurring). Thus, Article 1, Section 1 protects privacy against government intrusion much

more strongly than it protects it against infringement by private entities such as the NCAA. *Id.*; see *Sheehan*, 89 Cal.Rptr.3d at 602-03.

b. The District Cannot Meet its Burden of Justifying this Privacy Intrusion.

Because the suspicionless drug-testing program invades the Plaintiff Students' privacy, the District must prove as an affirmative defense that its need for the program outweighs the privacy intrusion. *Hill*, 7 Cal.4th at 40. The District cannot do so. The District did not expand its drug testing because it had any reason to think that students in the District – or students involved in competitive activities – use drugs at any higher rate than anybody else. In fact, the District never looked at *any* data on student drug use before it decided to adopt the new program. DEP 378:12-16, 387:13-388:15.[15] Instead, it decided to expand testing to include more than 58% of the entire student body – 2,620 students out of a total of 4,616 -- based on the idea that "one student at risk is too many" and that "any number, any percent, whether high or low, was too high." *Id.*, 213: 8-15. Actual numbers and data were irrelevant. *Id.*, 190:23-191:13. The only numbers of any type that the District could cite in support of the expanded testing program is that "many" of the "1 to 12 student expulsions" from district schools each month involve drugs in some way. *Id.*, 371:20-372:4. A government program that invades the privacy of Californians must be supported by facts, not guesswork and conjecture.

If the District had done any research before it adopted this program, it would have discovered that the rate of student drug use in the District is about the same as the statewide average, and slightly lower than in the other school districts in Shasta County. See EX 12 (drug use in the District); EX 14 (drug use in Shasta County). Over the last decade, rates of drug use have dropped across the nation, and the District acknowledges that drug use here "follows the national trends" and that there has been no increase in drug use over the last five years. DEP 299:16-19; 300:23-25; EX 16 (nationwide adolescent drug use). And as discussed below, students involved in school-related activities do not use drugs any more than do their peers. In fact, as noted above, of the hundreds of students tested this year because they participate in these activities, only "one or two" tested positive for anything. DEP 304:14-305:6.

---

[15] Although the District did claim in its federal grant application that drug use rates among its students were much higher than the national average, it has now admitted that those claims were baseless. DEP 449:5-25.

The District also apparently believed that students in FFA, math club, or choir should be tested in order to be "fair" to the athletes who were already required to give urine samples. DEP 215:19-24.[16] But math and choir competitions do not involve the "risks of physical injury to athletes, spectators, and others" that may justify testing athletes. See *Hill*, 7 Cal.4th at 46. Just as the government may test employees who operate heavy machinery but may not test office secretaries, a school's authority to test athletes does not extend to "mathletes."[17] As the Pennsylvania Supreme Court observed in invalidating a program like this one, "[s]tudents in the band, chess club, drama club, or academic clubs simply do not pose the same sort of danger to themselves or others" as do student athletes. *Theodore*, 836 A.2d at 92. The California Attorney General agrees: "Since the risk of physical injury is minimal in [non-athletic after-school activities], the basic justification for applying the drug surveillance program to athletic activities is missing." Opn. No. 79-408, 62 Ops. Cal. Atty. Gen. 344 (1979) (legality of suspicionless drug testing of high-school students).

Athletics is also different because of steroids. The main goal of the program in *Hill* was to maintain the integrity of competitive athletics by eliminating performance-enhancing drugs in the face of evidence that more than 80% of highly competitive athletes in certain sports used steroids, and rates of use in other sports were increasingly rapidly. *Id.* at 44-46. This both destroyed the integrity of athletics and also created a real incentive for other athletes to start using steroids themselves. *Id.*[18] The steroid problem is irrelevant outside the athletic context.

Finally, even if the District could show that it had a drug problem requiring such an invasive response, the fact remains that *random suspicionless drug testing does not reduce student drug use*. As the American Academy of Pediatrics Committee on School Health

---

[16] A desire for some sort of symbolic "fairness" to athletes who are forced to give samples does not justify testing others. *Theodore v. Delaware Valley School Dist.* (Pa. 2003) 836 A.2d 76, 95.

[17] Compare *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 188 (holding that Art. 1, § 1 prohibits random testing of "executive secretary whose job duties were neither safety nor security sensitive") with *Smith v. Fresno Irrigation Dist.* (1999) 72 Cal.App.4th 147, 164-65 (allowing testing of employee who operated heavy equipment near coworkers where effect of mistake "could be lethal"); see also *Loder*, 14 Cal.4th at 881 n.12.

[18] The Court was also cognizant that the NCAA had a business need to maintain its reputation for holding fair competitions, and that performance-enhancing drugs, like betting scandals or other corruption, would cost it money by harming its reputation among viewers. *Id.* at 46.

has recently stated, "there is little evidence of the effectiveness of school-based drug testing in the scientific literature." Taras Decl. ¶¶ 10-14, 15 (observing that [i]In Conclusion: Although it may seem intuitive that drug testing serves as a deterrent to illicit student drug use, there is very little evidence to support this."). As Professor Taras discusses in his declaration, suspicionless "student drug testing fails as a public health screen to identify and protect the health of students." *Id.* ¶ 10. It may actually harm students by exacerbating violence at home (which itself may increase the chance that the student will abuse drugs), causing students unnecessary anxiety, deterring students from taking part in activities that will reduce student drug use, and lead students to abuse less detectable – but often more dangerous – drugs such as inhalants and alcohol. *Id.* ¶¶ 16(i)-(vi). These concerns about the risks of student drug testing, combined with the lack of effectiveness in reducing drug use, have led the American Academy of Pediatrics to determine as a matter of official policy that "Pediatricians should not support drug testing in schools." *Id.* ¶ 15 n.6.

c. The District Has Feasible and Effective Alternatives to Suspicionless Drug Testing That Have A Lesser Impact on Privacy.

Even if the District's evidence could satisfy its burden of showing an affirmative defense, its expanded drug testing program would still violate Article I, Section 1 because of the availability of less intrusive means. See *Hill*, 7 Cal.4th at 40; *Edgerton v. State Personnel Bd.*, 83 Cal.App.4th 1350, 1361 (2000) (government defendant is "required to show that no less intrusive alternatives were available"). These less intrusive alternatives include observing students during the school day, testing based on reasonable suspicion, and providing education to students and student testing programs to parents who believe their children may be using drugs. The District has admitted it never even considered these less intrusive programs. DEP 380:10-13. Apparently, this was because the District considers the suspicionless drug testing of students to be "unrestrictive" and "not . . . an invasion of privacy." *Id.*, 378:17-25; 379:14-380:2.

Teachers and staff can observe student behavior, demeanor, and performance during the school day and during after-school activities. These hours of daily observation, along with the teacher's knowledge of each student's usual behavior, eliminate the need for random, suspicionless drug testing. For just this reason, the Court in *Loder* ruled that the government could test all *prospective* employees without suspicion, but not all *current* employees. 14 Cal.4th at 883; see also *Kraslawsky*, 56 Cal.App.4th at 188. Unlike the

athletes in *Hill*, who interacted with NCAA officials only at competitions, high school students—particularly those involved in curricular activities with performance components or in cocurricular and extracurricular activities—spend hours every day interacting with their teachers, administrators, and faculty advisors. School personnel, unlike the NCAA official in *Hill*, have ample opportunity to observe whether students are under the influence, which further reduces any need for suspicionless testing. *Loder*, 14 Cal.4th at 883; *Hill*, 7 Cal.4th at 50. Rather than testing students who give nobody any reason to think they have done anything wrong, the District could focus on students whose scholastic performance or behavior provide some indication that they are involved with drugs. See *York v. Wahkiakum School Dist. No. 200* (Wash. 2008) 178 P.3d 995, 1006, 1008, 1010-11 (Madsen, J., concurring). A program based on individualized suspicion and truly free consent is a viable, less intrusive, and an effective alternative to suspicionless testing. See *Loder*, 14 Cal.4th at 883; *Kraslawsky*, 56 Cal.App.4th at 188.

2. The District's Suspicionless Drug Testing Program Violates Article I, Section 13 of the California Constitution.

Article I, Section 13 prohibits the suspicionless searches of high school students. *William G.*, 40 Cal.3d at 564. In all searches, the official must have reasonable suspicion that the student has violated law or a school rule. *Id.* at 564. Forcing a person to provide a urine sample for a drug test constitutes a search. *Loder*, 14 Cal.4th at 876. Thus under *William G.*, suspicionless drug testing violates a student's right to be free from unreasonable search and seizure. That a 5-4 majority of the U.S. Supreme Court in the *Earls* case[19] upheld suspicionless drug testing of students involved in extracurricular activities against a federal challenge does not change this. Like many state constitutions, the "California constitution is more protective of the student's right to be free from searches and seizures than is the federal constitution." Kemerer, Sansom, and Kemerer (Stanford U. Press 2005) California School Law 391 (citing *William G.*)).[20]

Two state supreme courts have already held that rejected *Earls* on state-law grounds. The Pennsylvania Supreme Court held that suspicionless drug testing of students

---

[19] *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822.

[20] Although *William G.* relied on both the state and federal constitutions, as Justice Mosk observed in his dissent, in application *William G* is more protective than the federal rule. Compare 40 Cal.3d at 564 with *id.* at 572-74 (Mosk, J., dissenting).

involved in extracurricular activities violates that state's constitutional protection against unreasonable searches and seizures. *Theodore v. Delaware Valley School Dist.* (Pa. 2003) 836 A.2d 76. The court reached this conclusion even though the Pennsylvania Constitution is less protective of student privacy than Article I, Section 13. For example in Pennsylvania, school officials may lawfully conduct suspicionless mass searches of students' lockers, a practice that Article I, Section 13 forbids. Compare *id.* at 90 with *William G.*, 40 Cal.3d at 564 (stating that "[n]either indiscriminate searches of lockers nor more discrete searches of...a student, can take place absent the existence of reasonable suspicion."). It would be irrational to allow suspicionless mass searches by urinalysis to determine whether a student has smoked a cigarette or smoked marijuana over the weekend, while prohibiting suspicionless searches to determine whether a student is carrying drugs or a weapon at school and thus may present a serious and immediate danger to other students.

Similarly, the Washington Supreme Court has held that suspicionless drug testing of students violates its state constitution. *York*, 178 P.3d at 995. Washington's constitution, like California's, requires that school personnel have reasonable suspicion in order to search a student. *Id.* at 1002, 1005. Because urinalysis is at least as intrusive as other forms of searches, the court unanimously held drug tests must adhere to the same standard as all other searches. *Id.* at 997.

3. The District's Suspicionless Drug Testing Program Violates the Student Plaintiffs' Right to Equal Protection Under the California Constitution Because it Targets Students who are Less Likely than their Peers to Use Drugs and Infringes their Fundamental Rights to Privacy and Education.

Because the District's policy creates two classes of students – those who are subject to suspicionless drug testing, and those who are not – it violates the Equal Protection Clause. Courts use two standards in evaluating equal protection claims under the California Constitution. *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298-99. *All* laws that draw distinctions between classes of people are subject to "rational basis" review—the plaintiff must show that the challenged law bears no rational relationship to any legitimate state purpose. *Id.* Laws that touch on fundamental interests or involve suspect classifications (such as race or sex) are subject to the much more exacting "strict scrutiny" standard. *Id.* Under this standard, "the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law

are *necessary* to further its purpose." *Id.* (citations omitted). Accord, *In re Marriage Cases* (2008) 43 Cal.4th 757, 832.[21]

a. Testing Students Involved in Competitive Curricular Courses, Cocurricular and Extracurricular Activities but Not Students who Take Part in CRAs is Irrational and thus Violates Equal Protection.

California's Equal Protection Clause prohibits the government from creating irrational classifications of people. *Hays v. Wood* (1979) 25 Cal.3d 772, 786-87, 790-91; *People v. Hofsheier*, 37 Cal.4th at 1199, 1202 (equal protection demands "some rationality in the nature of the class singled out."). But creating irrational classifications is just what the District has done here: its suspicionless drug testing program singles out those students who are least likely to be involved with drugs. See *Theodore*, 836 A.2d at 92 (observing that "[n]ationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers."). Both common sense and all the research in the area show that students in after-school activities are less likely to use drugs and alcohol than are their peers who simply leave when the bell rings. See *id.* (citing N. Zill, C. Nord, & Loomis (1995) Adolescent Time Use, Risky Behavior and Outcomes 52). Taras Decl. ¶¶ 8(iii), 16(iii). This is born out by the opinions of those who participate in these activities (Brittany Decl. ¶¶ 7, 10; Deborah Brown Decl. ¶ 19; Ben Decl. ¶ 9; Jesse Decl. ¶¶ 10-11), but is also confirmed by the results of the testing that the district has already conducted as part of its expanded program: of the hundreds of students tested for their participation in these activities, only "one or two" tested positive.

Nor is there any other reason to single-out this group of students. As discussed above, the reasons that justify testing student athletes simply do not apply to students in choir or FFA. The new policy thus invades the privacy of those students least likely to require intervention—perhaps as a symbolic gesture—while ignoring those students who are most likely to be involved with drugs. The District's policy lacks a "fair and reasonable relationship to the stated legislative objective and therefore is in violation of the principles of equal protection." *Hays*, 25 Cal.3d at 795.

---

[21] Students who wish to participate in the competitive parts of their curricular courses and those who wish to participate in cocurricular and extracurricular activities are similarly situated to the general student population for purposes of equal protection. See *Long Beach*, 41 Cal. 3d at 946, 948, 951; *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199; *In re Marriage Cases*, 43 Cal. 4th at 831 n.54.

b. The District's Suspicionless Drug Testing Program Impinges Upon the Fundamental Interests of Education and Privacy and is therefore Subject to Strict Scrutiny Review, which it Fails.

"Education is a fundamental interest under the California equal protection guaranties." *Butt v. State of California* (1992) 4 Cal.4th 668, 683 (citations omitted).[22] This fundamental interest includes the right to participate fully in classes such as band and choir. It also includes the right to participate fully in cocurricular and extracurricular activities other than "purely recreational" activities such as "weekend dances or athletic events." *Hartzell v. Connell* (1984) 35 Cal.3d 899, 909-914 & n.14; *id.* at 902-03; *Levi v. O'Connell* (2006) 144 Cal.App.4th 700, 707.[23]

Similarly, privacy under Article I, Section 1 is a fundamental interest for purposes of state equal protection analysis. The ballot arguments in support of the privacy initiative specifically called privacy "a fundamental and compelling interest." Arg. In Favor of Prop. 11 ¶ 3; see also Rebuttal to Arg. Against Prop. 11 ("The right to privacy...is fundamental."). Thus our Supreme Court has held that forcing government employees to take a polygraph test that included questions about illegal drug use and prescription medications "impinge[d] on the fundamental right of privacy" and thus violated equal protection. *Long Beach*, 41 Cal.3d at 946, 948 (applying strict scrutiny); see also *Hill*, 7 Cal.4th at 34 & n.11 (reaffirming equal-protection holding of *Long Beach*); *Carmen M*, 141 Cal.App.4th at 482 (drug testing implicates "child's fundamental right of privacy"); *Sakotas v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 262, 272 (privacy and education are fundamental for purposes of state equal protection analysis).

Because the District drug-testing policy touches on the fundamental rights to privacy and education of some – but not all – students in the district, it violates equal protection unless the District can show "not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its

---

[22] There is no corresponding federal right to an education. *Butt*, 4 Cal.4th at 683.

[23] Some of the competitive activities involved in this suit are curricular activities within the meaning of Education Code section 35160.5(a)(4). See fn. 2, *supra*. Although students may lack a right to participate in after-school athletics, they have a fundamental right to participate in *educational* curricular, cocurricular and extracurricular activities. *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 262; *Levi v. O'Connell*, 144 Cal.App.4th at 707. As the District itself acknowledges, "Competitive Representational Activities are an integral part of the school curriculum...." EX 7, p. 1.

purpose." *Hernandez*, 41 Cal.4th at 298-99 (citations omitted). Because the program targets the students least likely to use drugs with no rational justification, it fails strict scrutiny as well as rational basis review.

For these reasons, movants are likely to prevail on their claim that the District's suspicionless drug testing program violates their rights to privacy, protection from unreasonable search and seizure, and equal protection.

B. This Court Should Issue a Preliminary Injunction in Order to Prevent Plaintiffs from Suffering Irreparable Harm to their Constitutional Rights to Privacy, Equal Protection, and an Education.

In addition to evaluating the strength of the claim, this Court must also weigh the relative harm that the grant or denial of an injunction would cause. *White*, 30 Cal.4th at 554. Without a preliminary injunction, the Student Plaintiffs will be forced to forfeit either their privacy rights or their rights to participate fully in their education. These rights, once violated, can never be redressed. A violation of constitutional rights "must always be considered a serious harm." *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, 1172; see also *Easyriders Freedom F.I.G.H.T. v. Hannigan* (9th Cir. 1996) 92 F.3d 1486, 1501 (violation of Fourth Amendment constitutes irreparable injury).

This general principal applies with particular force here. A student who asserts her privacy rights and refuses to submit to suspicionless urinalysis will never regain a lost opportunity to sing with the choir or play her flute in a state-wide competition – activities that are not only a fundamental part of her education but may help her get admitted to college. Nor can money – if damages were even available – compensate her for the embarrassment of being taken from class and forced to urinate in a cup while a monitor from a drug-testing company listens from inside the restroom. An injunction is needed to maintain the *status quo* and protect the Student Plaintiffs' rights from irreparable harm. *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1564-65; Code Civ. Proc. § 526(a)(4), (5).

In contrast, the District would suffer little harm if this Court enjoined it from imposing its policy on the Student Plaintiffs. The stated goal of the policy is to provide students with an incentive to say no to drugs. Even if the Student Plaintiffs needed this incentive, they would be the ones directly harmed by its loss, not the District.

"If the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205-06 (citations omitted); cf. *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 338-39 (stating that if plaintiffs show a high likelihood of success on the merits, the court may enjoin regardless of the balance of harms.). Here, plaintiffs have established that they will prevail on the merits *and* that denying a preliminary injunction would result in great, irreparable harm to them, while granting interim relief would cause little harm to the District. This Court should therefore enjoin the District from forcing the Student Plaintiffs to submit to suspicionless drug testing as a condition of participating in non-athletic activities pending the outcome of this case.

IV. CONCLUSION.

Student Plaintiffs respectfully request that the Court grant a preliminary injunction enjoining defendants from enforcing the Drug Testing Policy against them pending trial on the merits.

Dated: April 9, 2009.

MICHAEL T. RISHER
American Civil Liberties Union Foundation
of Northern California
39 Drumm Street
San Francisco, California 94111

PILLSBURY WINTHROP SHAW PITTMAN LLP
THOMAS V. LORAN III
MARLEY DEGNER
50 Fremont Street, Fifth Floor
San Francisco, CA 94105

By: Thomas V. Loran III
Thomas V. Loran III

Attorneys for Plaintiffs