SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SHASTA

HON. MONICA MARLOW Dept. 4
nl

#164933

BENJAMIN BROWN, et al.,
Plaintiffs,
vs.

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

NATURE OF PROCEEDINGS: **FINAL RULING ON MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs seek a preliminary injunction, enjoining Shasta Union High School District (the "District")] from enforcing its expanded drug testing program (the "Policy"). The Policy requires certain students to provide urine samples as a condition of certain school activities, such as a math club, chess club, choir, or band, despite there being no reason to suspect drug use. In order to prevail in its request for a preliminary injunction, Plaintiffs must demonstrate: (1) they are likely to prevail on the merits; and (2) they will suffer irreparable harm if the preliminary injunction is not granted. Plaintiffs have met their burden for purposes of the preliminary injunction. Therefore, the District is enjoined from enforcing the Policy pending the outcome of trial.

The Court is mindful that its role is limited to determining the constitutionality of the Policy. Policymaking is outside the purview of this Court. As a separate branch of government, the Court does not venture into policymaking or legislating. The parties have not cited any California legislation permitting or banning the Policy. If the Court finds the Policy to be constitutional, the advisability of the Policy is exclusively the province of the executive branch of government, acting in this case through a high school district, an arm of the executive branch. Therefore, for example, this Court does not determine whether it is sensible to bar a band student from playing the flute in the Christmas parade because the student refused to undergo random, suspicionless drug testing; but instead allowing her to carry a flag in the parade.[1] Nor does the Court determine whether it is sensible to bar a student from participating in choir because the student refuses to drug test and because choir is considered competitive, but then allow the student to participate in dinner musical theater productions, such as the Victorian Dinner or the Madrigal Dinner, because the productions are considered noncompetitive.[2]

[1] Example taken from declaration of a student.
[2] Example taken from Deposition of James Cloney, 4-7-08, page 131.

Limiting its review only to the constitutional issues raised by the parties, Plaintiffs raise three arguments as it relates to the Policy implemented by the District:

1. The Policy is a violation of the right to privacy, as set forth in Article I, §1 of the California Constitution.[3]
2. The Policy is a violation of the right to be free of unreasonable searches and seizures, as set forth in Article I, §13 of the California Constitution.[4]
3. The Policy is a denial of equal protection of the laws, as set forth in Article I, §7 of the California Constitution.[5]

I.
LIKELIHOOD OF PREVAILING ON THE MERITS

A. RIGHT TO PRIVACY

Constitutional protections extend to minors. This well-established legal precedent is set forth succinctly in the California Supreme Court case of *In re William G.* (1985) 40 Cal.3d 550 at 558:

> *While we recognize that the constitutional rights of minors need not always be coextensive with those of adults, it is well established that public school students do not shed their constitutional rights upon reaching the schoolhouse door. [citation omitted] 'The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards.' [citations omitted]*

Public school officials are governmental agents within the purview of constitutional protections. In carrying out searches and other disciplinary functions pursuant to policies, school officials act as representatives of the State, not merely as surrogates for the parents. *In re William G.*, *supra*, 40 Cal.3d at 560.

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[3] Article I, §1 provides: *All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.* This explicit reference to the right of privacy was added by initiative measure to the California Constitution in November 1972.

[4] Article I, §13 provides: *The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.*

[5] Article I, §7(a) provides, as pertinent here: *A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. …*

Plaintiffs contend that Article I, §1 of the California Constitution affords individuals more protection than the United States Constitution. Plaintiffs urge the Court to follow a line of California cases which are more protective of privacy rights of citizens of this State. Defendants urge the Court to follow the legal precedent set forth in United States Supreme Court cases. The federal cases are based on the prohibition against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution. The federal cases do not address the right to privacy set forth in the California Constitution. Our federalist form of government renders this distinction significant. Each state has a right to afford greater protection to it citizens than is afforded under the United States Constitution. *In re Carmen M.* (2006) 141 Cal.App.4th 478, 491 n. 11. The State of California has chosen to do so by virtue of the explicit right to privacy found in Article I, §1. Therefore, this Court will determine the outcome of the privacy issue presented in this case under the explicit provision of the California Constitution.

Decisions of the California Supreme Court underscore the importance of the right to privacy, including the privacy of students. As set forth in *In re William G.*, 40 Cal.3d at 563:

> *The privacy of a student, the very young or the teenager, must be respected. By showing that respect the institutions of learning teach constitutional rights and responsibilities by example. 'That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.' (Board of Education v. Barnette, 319 U.S. at p. 637)*

Turning to the Policy at issue in this case, the Policy is intended to apply to students based on so-called "competitive representational activities" ("CRA's"). However, in the District's execution of the Policy, the Policy also is applied to students based not only on their involvement in extracurricular competitive activities, but also based on their involvement in (1) mandated curricular classes, and (2) co-curricular activities that are required and used for grading purposes in mandated curricular classes.[6]

Defendants contend that the privacy intrusion is negligible because someone listens to, rather than observes the act of urination, the confidentiality of the test results is maintained and limited to a "need to know" group of people, and the test results are not used as a law enforcement tool.

[6] This is based on the declarations of the students. Although Plaintiff's Supplemental Declaration of Marley Degner in Support of Student Plaintiffs' Motion for Preliminary Injunction, filed April 27, 2009, includes a request to take judicial notice of the District's 2009-2010 Course Catalog, the request is buried in paragraph 4 of the Declaration without any notice of the request in the caption of the document. The request, which was submitted along with Plaintiffs' Reply, is denied as untimely and not properly noticed.

Plaintiffs must prove that the students who are the target of the Policy have a reasonable expectation of privacy in a legally recognized privacy interest. The privacy interest typically falls into one or both of the following categories: (1) informational privacy, precluding the dissemination or misuse of sensitive and confidential information, and (2) an autonomy privacy, an interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference. Plaintiffs also must prove that the Policy invades the legally protected privacy interest, and that the invasion is serious. The burden then shifts to Defendants to prove that circumstances justify the invasion of privacy by a government agency because the invasion of privacy substantially furthers a compelling competing interest. If Defendants prove that a compelling competing interest is substantially furthered, then the burden shifts back to the Plaintiffs to prove there was a practical, effective, and less invasive method of achieving Defendants' purpose.

1. Reasonable expectation of privacy in a legally recognized privacy interest. Plaintiffs are likely to prevail on this issue. High school students are called out of class for the purpose of urine testing. Although the Policy does not include observation of the act of urination, the student is directed to a particular area where other students are lined up, a monitor listens to the act of urination, and the student is then directed to return to the classroom. The specimen is provided to a laboratory, and positive results are provided to some school personnel.

   "Informational privacy" is implicated because the examination of the urine sample may reveal significant information concerning the students' health or illnesses, as well as what medications or drugs have been ingested. "Autonomy privacy" is implicated because it intrudes upon the privacy of excretory functions when students are required to urinate upon demand within the hearing of another person.

   It is likely that Plaintiffs will prevail in establishing that legally recognized informational and autonomy privacy interests are implicated in the Policy. *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 at 41.

2. The seriousness of the invasion of the legally recognized privacy interest. Defendants argue the invasion is not serious, but rather is only negligible. Since the conduct infringes upon a *constitutionally protected* privacy interest, the *constitutional infringement* alone is sufficient to demonstrate that a serious, rather than negligible or trivial, privacy interest is at stake.[7] Assuming the constitutional infringement alone is not sufficient to deem it serious, then one must analyze the seriousness of the invasion viewed in the context of the activities of the targeted students and the normal conditions under which the activities are undertaken. *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 at 41.

[7] See Concurring and Dissenting Opinion of Justice George [now Chief Justice George] in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 at 62.

Unlike participation in athletics, students participating in a math club, chess club, choir, band, symphony, or Future Farmers of America are not involved in routine regulation and scrutiny of their physical fitness and bodily condition. Nor are they typically involved in exchanging private medical information so that a teacher may monitor the ability to play a flute, or calculate a math problem, or raise a market hog. While drug testing has become a highly visible, pervasive and well accepted part of athletic competition, particularly on intercollegiate and professional levels, it is not a reasonably expected part of the life of a member of the choir or math club.

Also, in particular instances there is insufficient advance notice and opportunity to consent to testing before signing up for certain targeted activities. Being presented with a form to sign for drug testing comes as an unwelcome surprise to students who unwittingly sign up to participate in certain activities, or take a class that includes participation in an activity that the school determines is a CRA. Furthermore, the District's determination of what constitutes a CRA is made in some instances on an *ad hoc* and arbitrary basis.

Finally, it is not solely the student's choice whether the student participates in the CRA. According to one student's declaration, he has a 3.5 GPA, aspires to attend college, and is participating in an activity because he understands it to meet the entrance requirements for the State University system. Another student is participating in an activity which the District deems to be a CRA but is understood by the student to be a graded and required activity for the music classes she is taking. Another student is taking an Integrated Agricultural Biology course, a requirement of which he understands to include participation in Future Farmers of America. The District has deemed such an activity to be a CRA because it involves the competitive activity of raising a market hog.

The context of this drug testing program is unlike the context of drug testing of athletes. Since both informational (collection and use of private information) and autonomy (the act of urination) privacy interests are implicated, when viewed in the context of the targeted activities, the Court finds it is likely that Plaintiffs will prevail on the merits in establishing that random, suspicionless drug testing of students in these activities is a *serious* invasion of privacy. The burden now shifts to the District to prove a justification for the invasion of privacy.

3. The District's justification. Because a government agency is involved, the District must prove that the invasion of privacy substantially furthers a compelling competing interest.

   There is no evidence that students in band, choir, FFA or other activities use drugs at a higher rate than do other students. Unlike athletes, there is no evidence that drugs are used to enhance a student's flute playing, choir performance, chess playing, debating skills, math team skills, or farming skills. There is no evidence presented that cheerleaders are engaging in drug use to enhance the physical

performances which accompany that activity. There is no evidence that students engaging in any of the activities that trigger the drug testing are more likely to engage in drug use because of the activity. There is no evidence that requiring the drug testing as a condition of engaging in the activities has an effect on drug usage among students.

The evidence of the justification for the invasion of privacy consists of a general, sincere concern of the effects of drug use by students. Under this reasoning, all students and all people would be drug tested for their own good, even if they were not suspected of drug use. It is not because there is a greater need to test this group of students. Rather, this is a group of students, in addition to athletes, that they believe they legally can target. It is an attempt to cast a wide net for drug testing of students based on the general concern about drug use among students in general, and the good faith belief that the Policy will be found to be constitutional.

The Defendants' concern is legitimate. It is a legitimate concern that any drug use by students engaging in certain activities puts that student, other students, and members of the public at risk. However, this concern logically cannot be limited to the students participating in the targeted activities. Unlike competitive sports, the risks of the targeted activities are not unusual. The legitimate concern raised by the Defendants reaches into many classes in the District's curriculum, not just the targeted activities. Field trips are common in regular curricular classes. Machinery, equipment, appliances and chemicals are present in regular curricular classes. Gym class requires physical activity that could endanger a drug user. According to the testimony of Kerrie Hoppes, Executive Director of the counseling program, it does not matter whether a student is a member of a club or not a member of a club; drug use spans both groups of students. There is no evidence of why drug testing is required of students participating in the targeted activities, but not required of students participating in regular curricular activities which present the same circumstances giving rise to the District's legitimate concern of drug use.[8] Therefore, the Court fails to see the justification for the invasion of privacy of students engaging in the targeted activities when that same privacy invasion, even if arguably negligible rather than serious, is not imposed upon similarly situated students.[9]

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[8] The District does not have in place a policy of random drug testing of the general student body. This is consistent with the holding in the California Supreme Court case of *In re William G.* (1985) 40 Cal.3d 550 at 564. That case holds that a reasonable suspicion is an absolute minimum requirement for a search of a student, or a group of students, under Article I, §13 of the California Constitution.

[9] It is noteworthy that the District has another policy in place for those students in its general population whom the District has reason to suspect are using drugs. It is a drug diversion program. This program is directed at all students, and does not target a particular group based on school activities. The Court also notes the deposition testimony of Kerrie Hoppes, Executive Director of Steps to Tomorrow, a nonprofit counseling center, that there is a 6% recidivism rate for students in the general population who complete the District's diversion program, which Ms. Hoppes describes as "incredibly low." DIST. DEP. 294:15-22. Plaintiffs do not challenge, and this decision does not affect, that program.

Defendants express a concern about students engaging in some activities that require overnight travel, working around hazardous equipment, or engaging in unusual physical activity such as flips and extreme dance moves. However, Defendants do not explain why the Policy is not directed at these specific activities, rather than the wide net that the Policy has cast when it includes all competitive representational activities. When the compelling interest is to avoid or minimize a certain harm, the issue must be resolved with an eye towards the particular harm.

Defendants refer the Court to the declaration of Robert DuPont, M.D. as substantial evidence that drug testing reduces student drug use. Dr. DuPont's declaration refers to a study which has not yet been submitted for publication. There is no evidence presented as to whether it has been peer-reviewed. The entire study was not submitted as evidence. The declaration references only portions of the study. While the appropriate foundation might be laid at the time of trial for the admissibility of the unpublished study, the foundation for the admissibility of the excerpts from the unpublished study has not been laid. Therefore, the Court will not consider the excerpts. However, the Court will take into consideration that Dr. DuPont's opinions are based, in part, on the results of his unpublished study. Dr. DuPont reaches the conclusion that ***tested*** students are less likely to use drugs than ***nontested*** students. When the only students tested are the students engaged in band, choir, math club, or athletics, etc., one would not be surprised by that result. It does not follow that drug testing reduces overall student drug use. Perhaps it simply means that students in band, choir, etc. are not the students inclined to use drugs; and that perhaps the students who are not interested in joining the band or choir or math club, and therefore not subject to being randomly drug tested, are the students more inclined to use drugs. While this provides an interesting area for inquiry at the time of trial, the state of the record is such that it does not provide substantial evidence of a compelling interest in drug testing students who participate in CRA's.

The District has not met its burden of proving that the Policy substantially furthers a compelling competing interest.

The Court has reviewed the United States Supreme Court cases upon which Defendants primarily rely: *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002) 536 U.S. 822 and *Vernonia School District 47J v. Acton* (1995) 515 U.S. 646. *Vernonia School District* involved drug testing of athletes, not members of the school choir or math club. *Earls* involved competitive extracurricular activities, not the type of "competitive representational activities" involved in this case. Therefore, *Earls* is distinguishable. Also, *Earls* was decided under the Fourth Amendment to the United States Constitution, the right to be free of unreasonable searches and seizures. The Court in both *Vernonia* and *Earls* limited its inquiry to whether the drug testing policies were reasonable. Neither case addressed a right to privacy claim. Nor did those cases review the unreasonable search and seizure claim in

the context of the explicit right to privacy set forth in our State Constitution, a right added to the California Constitution by an initiative adopted by the voters of the State of California.

Plaintiffs are likely to prevail on the merits on their invasion of privacy claim.

B. RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES

Reasonable suspicion is an absolute minimum requirement for a search of a student, or a group of students, under Article I, §13 of the California Constitution. *In re William G.* (1985) 40 Cal.3d 550 at 564. This is legal precedent by the California Supreme Court by which this Court and the State's citizens are bound. Therefore, the schools of the State of California must not search students by means of mandatory urinalysis without reasonable suspicion. Of course, this explains why the District does not have in place a policy of random drug testing of the general student body. Because the Policy is not based on a reasonable suspicion of drug use by the group of students who are the target of the Policy, the California Supreme Court case of *In re William G* mandates that this trial court find the Policy in violation of Article I, §13 of the California Constitution.

This is not to say that a drug testing policy could not be instituted that is compatible with constitutional rights. However, in considering whether any drug testing policy is reasonable under Article I, §13, it must be viewed in the context of the right to privacy provision of Article I, §1. The drug testing policy must substantially further a compelling competing interest, which the Policy at issue does not.

Plaintiffs are likely to prevail on the merits under their unreasonable search and seizure claim.

C. DENIAL OF EQUAL PROTECTION OF THE LAWS

Because the Court finds that Plaintiffs are likely to prevail on the merits under either their invasion of privacy claim or unreasonable search and seizure claim, it need not decide whether Plaintiffs also are likely to prevail on the denial of equal protection claim.

II.
IRREPARABLE HARM

Plaintiffs will suffer irreparable harm. According to the declaration of one student, she is taking advanced placement classes, working part-time, and practicing flute three days a week before school commences each morning. She is being denied the opportunity to participate in statewide flute competition in mid-May and is concerned she will not be allowed to participate in the Rodeo Parade later in May. According to another student's declaration, he was threatened with removal from his biology class and publicly embarrassed by an assistant principal. Other students are subjecting themselves to random, suspicionless drug testing, which is likely to be found to be unconstitutional, so

that they may participate in cocurricular activities which are required as part of the grading process for classes which are part of the regular curriculum. Students are missing class time when pulled out of class for testing – 35 minutes in one case; 25 minutes in another case. Among the target group, students are being treated differently. According to declarations, two students refused to test when called out of class. One student was allowed to test at a testing company three days later, missing a full class to do so. The other student was not allowed to test later that same day at the same company. The Court notes that although the test results are not used for law enforcement purposes, deputy sheriffs are involved in the testing procedure from the standpoint of supervising students. Although not a basis for its holding, the Court wonders about the many students who may have foregone the opportunity to participate in cocurricular or extracurricular activities because they, or their parents, object on constitutional grounds to the mandated random, suspicionless drug testing when its execution involves law enforcement personnel.

The District's goal of drug-free schools is admirable and commendable. Identifying even one student in need of help in abandoning or overcoming drug use also is a worthy goal. No rational person would question the benefit to society of such goals. However, the policy must be consistent with the California Constitution and the California Supreme Court cases interpreting the Constitution, by which this Court is bound.

The Court grants the preliminary injunction. Defendants are enjoined from enforcing the Policy pending trial on the merits. Plaintiffs shall prepare the injunction.

III
RULING ON OBJECTIONS TO EVIDENCE

Defendants' Objection to Evidence Offered by Plaintiffs	
1-7	Sustained
8	Overruled as to first sentence: "Former superintendent Michael Stewart told the Board ….." Sustained as to last sentence: "Mr. Stewart was concerned that if ….."
9-21	Sustained
22	Overruled. The statements referenced in the objection are not offered as evidence, but rather as legal authority from a Sister State.

Plaintiffs' Objections to Evidence Offered by Defendants	
1-2	Sustained
3	Overruled. The evidence is received for the limited purpose of the basis for declarant's opinion; it is not received for the truth of the matter.
4-7	Sustained
8	Overruled
9	Sustained

IV.
TRIAL SETTING/STATUS CONFERENCE

The matter is set for Trial Setting/ Status Conference on **Monday, June 15, 2009, at 9:00 a.m. in Department 4**. The parties are encouraged to consider a specially set settlement conference by the Court or a private mediation to attempt to agree on a student drug testing policy which is sensitive to the constitutionally protected interests of the Plaintiffs and the compelling interests of the Defendants.

Dated: May 6, 2009

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MONICA MARLOW
Judge of the Superior Court

CERTIFICATE OF MAILING
State of California, County of Shasta

I, the undersigned, certify under penalty of perjury under the laws of the State of California that I am a Deputy Court Clerk of the above-entitled court and not a party to the within action; that I mailed a true and correct copy of the above to each person listed below, by depositing same in the United States Post Office in Redding, California, enclosed in sealed envelopes with postage prepaid.

Thomas V. Loran, III, Esq.
PILLSBURY WINTHROP SHAW PITTMAN LLP
50 Fremont Street, Fifth Floor
San Francisco, CA 94105

Michael T. Risher, Esq.
American Civil Liberties Union
Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111

John P. Kelley, Esq.
HALKIDES, MORGAN & KELLEY
P.O. Drawer 492170
Redding, CA 96049-2170

Dated: May 6, 2009

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Deputy Clerk