Filed 9/2/10 Brown v. Shasta Union High School Dist. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

DEBORAH BROWN et al., Plaintiffs and Respondents, v. SHASTA UNION HIGH SCHOOL DISTRICT et al., Defendants and Appellants.	C061972 (Super. Ct. No. 164933)

In *Vernonia School Dist. 47j v. Acton* (1995) 515 U.S. 646 [132 L.Ed.2d 564] (*Acton*), the United States Supreme Court held that a school district's policy of suspicionless random drug testing of student athletes did not violate the federal constitutional right to be free from unreasonable searches. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002) 536 U.S. 822 [153 L.Ed.2d 735] (*Earls*), the court, in a five to four decision, extended *Acton* to uphold, against a Fourth Amendment challenge, a school

district's drug testing policy that applied to all students participating in competitive extracurricular activities.

Following the decision in *Earls*, Shasta Union High School District expanded its random drug testing policy from covering only student athletes to covering all students who participated in competitive representational activities, such as band, choir, future farmers of America (FFA), and science bowl. In this case, we must determine whether the trial court abused its discretion by granting a preliminary injunction based on a finding that plaintiffs, three students and their parents as guardians ad litem, were likely to prevail at trial on their challenge to the expanded drug testing policy, facially and as applied, under the California Constitution.

Defendants, the Shasta Union High School District, the superintendent of the District, and members of its Board of Trustees (collectively, the District), appeal from the grant of a preliminary injunction, enjoining enforcement of the District's expanded random drug testing policy. The District contends the random drug testing program does not violate the right to privacy, the prohibition against unreasonable search and seizures, or equal protection under the California Constitution. The District urges this court to decide the merits of the lawsuit on its appeal from the preliminary injunction.

We limit our review to whether the trial court abused its discretion in granting the preliminary injunction. We conclude that the District has failed to show that the trial court abused

its discretion in finding, on this record, that plaintiffs were likely to prevail on their challenge to the expanded drug testing program on privacy grounds under the California Constitution. Unlike the federal Constitution, California's Constitution grants an express right to privacy; thus, we focus on California case law on the right to privacy rather than federal law on the Fourth Amendment, as the District urges. Plaintiffs put forth a showing sufficient to establish the threshold elements of a claim for invasion of the constitutional right to privacy. In balancing that invasion against the District's justification for the expanded drug testing, the trial court could reasonably find that plaintiffs were likely to prevail due to the District's vague and shifting justifications for expanding drug testing to these participants in competitive representational activities and the lack of any showing that selecting only these students for testing was reasonable to further the District's goal of deterring drug and alcohol use. We affirm the preliminary injunction and let the matter proceed to trial on the merits.

FACTUAL AND PROCEDURAL BACKGROUND

The District's Adoption of an Expanded Random Drug Testing Program

Before 2008, the District had a random drug testing program limited to athletes.[1] Some parents thought it was unfair to test only athletes, and there was some resentment among the coaches that other students were not tested as well.

Beverly Stupek was elected to the Board of Trustees of the District in late 2005. She was concerned about student drug use, based on many conversations, including those with her children who participated in music activities in the District's schools. She spoke with the superintendent, Michael Stuart, about expanding drug testing. Stuart had heard a "tremendous" amount of anecdotal evidence that students, including music students, used drugs and alcohol. His sons had reported drug use at school. A choreographer who worked on the school musical complained about students coming to class stoned.

The Board was concerned about drug use by students, believing it was too high. They were not concerned about whether the drug use was higher than the national average.[2] In response to interrogatories, the District stated the need for

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[1] Plaintiffs do not challenge the random drug testing of athletes, or testing with consent, or based upon a reasonable suspicion of drug use or possession.

[2] A grant proposal to obtain federal funding for the expanded drug testing program stated drug use in the District was higher than the national average. The District conceded there was no support for this statement.

the expanded drug testing was to reduce drug use. The District's goals were to reduce drug use by providing students an excuse or reason to not use drugs and to provide counseling and further education for those who used drugs. The interrogatory response stated there had been disciplinary events involving students in extracurricular events possessing, using, or selling drugs and alcohol. "High school students were being injured and killed from drug and/or alcohol use."[3] The idea behind the drug testing program was to give the students a tool to say "no"; they would lose something they loved--participation in certain activities--if they chose to drink or use drugs.

The District researched federal law on the legality of random drug testing of students. A law firm provided the District with a legal memorandum that concluded, relying on *Acton* and *Earls*, that random drug testing of students who voluntarily participated in athletics or extracurricular activities was constitutional. The memorandum analyzed only federal law. Stuart talked to school officials in Oklahoma who had been involved in a drug testing program that had been upheld by the United States Supreme Court in *Earls*. James Cloney, the District's subsequent superintendent, explained it was "important to test [the] students that we are able to." He had no reason to believe students involved in competitive

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[3] In his deposition, Superintendent Stuart could not recall a specific incident of a student being injured or killed. Nor could he recall specific events demonstrating a need for the policy.

representational activities used drugs or alcohol more than other students; it was not an issue of fairness, but an issue of what could be done "as far as preven[ta]tive measure to prevent students in general from using drugs."

The Expanded Random Drug Testing Program

In 2008, the District approved an expanded random drug testing program. A description of the program was included in the student handbook for the 2008-2009 academic year. The program requires mandatory random drug testing for all students who participate in Competitive Representational Activities (CRA's). The District's Competitive Representational Activities Code defines CRA's as "All activities sanctioned by and under the control and jurisdiction of the Shasta Union High School District that are competitive, extra-curricular or co-curricular. These activities do not occur during the regular course of the school day, and include Competitive Representational Activities which occur during the summer vacation."

In addition to athletics, CRA's include choir, band, science bowl, trimathlon, mock trial, and future farmers of America.[4] Some of these activities are part of a graded course, which satisfies one of the admission requirements for the

[4] According to allegations of the complaint, the District's draft list of CRA's also included activities such as bowling club, chess club, photography club, future business leaders of America, and ROTC.

University of California and California State University.[5] The expanded random drug testing policy covers 56.8 percent of the high school students in the District.

The drug testing program tests for methamphetamine, chlorochromate, amphetamine, phencyclidine, cocaine, marijuana, methadone, barbiturates, benzodiazepines, opiates, oxycodone, nicotine, and alcohol.

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[5] Plaintiffs contend that although the District considers CRA's to be extracurricular or co-curricular, not all CRA's meet the definition of these terms set forth in the Education Code. The Education Code defines an extracurricular activity as "a program that has all of the following characteristics: [¶] (A) The program is supervised or financed by the school district. [¶] (B) Pupils participating in the program represent the school district. [¶] (C) Pupils exercise some degree of freedom in either the selection, planning, or control of the program. [¶] (D) The program includes both preparation for performance and performance before an audience or spectators." (Ed. Code, § 35160.5, subd. (a)(1).) 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.*, subd. (a)(2).) A "'cocurricular activity' is defined as a program that may be associated with the curriculum in a regular classroom." (Ed. Code, § 35160.5, subd. (a)(3).)

Courses that fulfill entrance requirements for state universities are excluded from these definitions. "Any 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." (Ed. Code, § 36160.5, subd. (a)(4).)

Because declarations by plaintiffs establish that some CRA's satisfy university admission requirements, we deny plaintiffs' request for judicial notice of the District's course catalog and certified course lists for UC and CSU to establish the same.

Through January 14, 2009, the District had conducted 391 random drug tests. In the 2008-2009 school year, there were 8 positive tests and 20 false positives.[6] In 2007-2008, before the expanded program went into effect and only athletes were tested, there were 10 positive drug tests.

The Testing Procedure

The District contracted with a drug testing company, Compliance Associates, to conduct the testing. The same protocol is used for the expanded program as was used for the athlete testing program. Rosters of students who are eligible for testing are sent to Compliance Associates who pulls a random list for each testing day. The goal is to test 35 students at each of the three main high schools, Foothill, Enterprise and Shasta. An assistant principal reviews the list to make certain each student is still participating in a CRA. An alternate list of 10 students at each school is also prepared. All three high schools are tested the same day in the morning.

On the day of testing, an assistant principal pulls the student out of class. There is no advance notice to the student's parents. The student is taken to a secured restroom where he signs a chain of custody form. Males go to one restroom and females to another. Compliance Associates provides a male and female monitor at each test site. An assistant

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[6] A false positive occurs when the initial result shown in the I-Cup indicates positive, but the lab confirms it is negative.

principal is nearby. An armed sheriff's deputy may also be present for supervision.

The student goes in a stall and urinates into a special cup, known as an I-Cup. The monitor waits in the restroom and can hear the student urinate. The student places a lid on the cup and hands it to the monitor.

The results are reported to the project coordinator usually within a week. If the initial test result on the I-Cup is positive, the sample is sent to a certified lab. If the result is confirmed positive, a medical review officer, selected by Compliance Associates, contacts the student's parents to ask about prescription medicine the student is taking that could affect the result. The medical review officer verifies the student's prescription medicine and makes the final determination of whether the drug test is positive.[7]

A positive result is disclosed to the program coordinator, an assistant principal, the principal, the student and the student's parents. A positive result is not reported to law enforcement. The test results are kept in a locked cabinet and the records are destroyed when the student graduates.

Consequences of a Positive Test Result

The consequences for a positive test, primarily loss of the ability to participate in a CRA, are progressively greater for each positive test. For a first positive test, the student and

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[7] It is unknown if the medical review officer is a physician. There is no procedure for challenging a positive result.

his parents are notified and given a chance to be heard on the matter with the principal or his designee. The student is given two options. He may take a weekly drug test at his expense for six weeks, with all negative results (a positive result is considered a second offense), miss two weeks of participation in the CRA, and enroll in and attend the District's drug diversion program or a similar program at his expense. Alternatively, the student is suspended from the CRA for nine weeks and must be retested before he is eligible for participation in another CRA.

For a second offense, the student may not participate in a CRA for that season and the following season. He must be retested to be eligible to participate in a CRA. For the third offense, the student is not eligible for participation in a CRA for 12 months. For reinstatement, he must take a monthly drug test at his expense for 12 months, with all negative results. Further violations result in a permanent ban from CRA's.

Under the District's program, missing a co-curricular activity due to a positive drug test will not result in a reduction of a course grade. The student will be given an alternate assignment in lieu of the missed event. The District has no policy regarding alternative assignments.

The District's drug diversion program has three components: five two-hour classes, two individual counseling sessions, and one family counseling session. The expanded drug testing has not increased the size of the classes. In the past five years, drug use in the area has been consistent. The recidivism rate for the drug diversion program is about six percent. Drug and

alcohol abuse education are part of the District's personal growth and psychology classes.

The Lawsuit

In December of 2008, plaintiffs, two high school students and their parents as guardian ad litem, brought suit to declare the District's expanded random drug testing program unconstitutional both facially and as applied. The two student plaintiffs were Benjamin Brown and Brittany Dalton. Brown was a senior at Enterprise High.[8] He took five music classes, had a 3.75 grade point average, and was on the Honor Roll. Dalton was also a senior at Enterprise. She took four music classes, had a 3.5 grade point average, was on the Honor Roll, and had a job.

Plaintiffs alleged the random drug testing program violated their rights under the California Constitution to privacy, to be free of unreasonable searches and seizures, and to equal protection. They also asserted a taxpayer action for illegal and wasteful expenditure of public funds. They sought a preliminary and permanent injunction and a declaration that the program was unconstitutional on its face and as applied.

The complaint was amended to add Jesse Simonis as a plaintiff. Simonis was a sophomore at Foothill High School. He took integrated agricultural biology, which met the requirements for the University of California and California State University

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[8] In his deposition, Superintendent Stuart testified the main disagreement with the expanded drug testing program came from Enterprise parents.

and required participation in FFA. The amended complaint alleged Simonis objected to drug testing; when an assistant principal threatened him with not being able to participate in FFA and being kicked out of his biology class, he submitted.

Motion for Preliminary Injunction

Plaintiffs moved for a preliminary injunction to enjoin both enforcement of the expanded drug testing program and any adverse action against any student plaintiff due to his objection or refusal to consent to the program on the grounds that the program was invalid. They asserted they had no adequate remedy at law, and they would suffer irreparable injury without an injunction.

In support of the motion, plaintiffs provided the declaration of Howard Taras, a professor of pediatrics at the University of California San Diego who was not compensated for his declaration. He declared the District's drug testing program did not meet most criteria for a reasonable public health screen and did not responsibly measure whether such intervention might be the cause of plausible, inadvertent harm to students. He found very little evidence supporting drug testing as a deterrent. He cited two studies; one found no relationship between drug testing and drug use, and the second found there was less steroid use with testing, but testing had no effect on alcohol use. Taras believed the District was acting irresponsibly in not weighing the benefits and harm of the program. He identified possible harms of drug testing: deterioration of unstable homes when there was a positive

result; creating anxiety and discouraging participation in CRA's; increasing the use of riskier but less detectable drugs; creating a less supportive school environment; and taking money away from proven programs.

In opposition, the District provided the declaration of Robert DuPont, a psychiatrist whose career was devoted to drug abuse research, treatment and prevention. DuPont was an advocate of random drug testing of students; random student drug testing was one of four priorities of the Institute of Behavior and Health of which he was the president. DuPont had led a new study, yet to be published, on student drug testing. The study showed that students believed drug testing reduces their drug use and that tested students were less likely to use drugs than nontested students. DuPont opposed suspicion-based drug testing as not feasible because teachers were not able to identify drug use, particularly in teenagers who commonly have mood swings and unpredictable behavior.

Plaintiffs objected to the lack of foundation for DuPont's unpublished study.

The District also provided the declaration of Jim Cloney, the current superintendent. He stated that all CRA's have unique features that distinguish them from the regular curriculum. All CRA's have after school and weekend events. Most involve long bus rides and many require rigorous physical activity that could lead to serious injury. Because the events took place off campus, students had to be more independent, with little or no supervision. In November 2007, only three months

before the District voted to expand the drug testing, three choir students were caught selling prescription drugs on a bus.

The Ruling

The trial court found plaintiffs met their burden for a preliminary injunction. The court found plaintiffs were likely to prevail on the privacy claim and the search and seizure claim. It did not address the equal protection claim. The court found plaintiffs would suffer irreparable harm. The court received DuPont's declaration concerning the unpublished study for the limited purpose of providing the basis of his opinion and not for the truth of the matter. Other objections to his declaration were sustained.

DISCUSSION

I.

Standard of Review

"[A]s a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause. [Citation.]" (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73.)

Generally, a superior court's ruling on an application for a preliminary injunction is reviewed for an abuse of discretion.

(*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) The party challenging the superior court's order has the burden of making a clear showing of an abuse of discretion. (*Biosense Webster, Inc. v. Superior Court* (2006) 135 Cal.App.4th 827, 834.)

The District notes that, on appeal from the grant of a preliminary injunction, a reviewing court may determine the merits of facial constitutional attacks on legislation or a regulation, thus implicitly urging this court to do so here. Such an approach may be appropriate where there are no material factual issues to be resolved. (See *Cohen v. Board of Supervisors, supra,* 40 Cal.3d 277, 287, and cases cited therein.) We decline to resolve the merits of this case because, as discussed below, disputed material factual issues remain. Further, plaintiffs' challenge to the constitutionality of the District's expanded drug testing program is not limited to a facial challenge. They also challenge the constitutionality of the program as applied which, of course, raises factual issues.

II.

The Trial Court Did Not Abuse Its Discretion in Finding Plaintiffs Were Likely to Prevail on Their Privacy Challenge

Unlike the federal Constitution, the California Constitution contains an explicit guarantee of the right of privacy. (Cal. Const., art. I, § 1; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326.) Article I, section 1 of the California Constitution 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*." (Italics added.) "[I]n many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts. [Citations.]"[9] (*American Academy of Pediatrics v. Lungren, supra*, at pp. 326-327.)

This constitutional provision, in itself, "'creates a legal and enforceable right of privacy for every Californian.'" (*White v. Davis* (1975) 13 Cal.3d 757, 775.) "The party claiming a violation of the constitutional right of privacy established in article I, section 1 of the California Constitution must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest." (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 338, citing *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40 (*Hill*).)

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[9] Indeed, the California Constitution has often been construed "as providing greater protection than that afforded by parallel provisions of the United States Constitution." (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 261, fn. 4.)

These three "elements" are properly viewed "simply as 'threshold elements' that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision. These elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 (*Loder*).)[10]

"Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. [Citations.] Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Hill, supra*, 7 cal.4th at p. 40.)

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[10] There was no majority opinion in *Loder*; the lead opinion was signed by two justices but five justices concluded that the challenged drug testing program was valid in the preemployment context and four justices concluded it was invalid in the prepromotion context. (*Loder, supra*, at p. 853, fn. 1.) All citations to *Loder* are to the lead opinion unless otherwise stated.

Legally Protected Privacy Interest

"Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill*, *supra*, 7 Cal.4th at p. 35.) Here both privacy interests are at stake. Informational privacy is implicated both by testing the urine sample and by requiring the student's parent to disclose any medications the student is taking. Autonomy privacy is implicated by requiring the student to submit to monitored urinalysis.

"As the *Hill* decision establishes, a procedure that (1) requires individuals to provide a urine sample under monitored conditions, (2) authorizes the administering entity to test the sample in order to acquire information concerning the internal state of the tested individual's body, and (3) requires an individual to disclose medications that he or she currently is taking, clearly intrudes upon both autonomy privacy interests and informational privacy interests that are protected by the state Constitution." (*Loder, supra,* 14 Cal.4th at p. 896.) This conclusion applies to children as well as adults. (*In re Carmen M.* (2006) 141 Cal.App.4th 478, 490 ["Without question, court-ordered drug testing of dependent children implicates those individuals' right to privacy, protected by article I, section 1 of the California Constitution"].)

Reasonable Expectation of Privacy

While public school children do not shed their constitutional rights at the schoolhouse door (*Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503, 506 [21 L.Ed.2d 731, 737]), it is well established that a student's privacy rights are "considerably restricted" at school. (*In re William G.* (1985) 40 Cal.3d 550, 563.) Attendance is mandatory and school officials have an obligation to protect the health and welfare of students and to provide a safe and welcoming school environment. (*Ibid*.) This custodial function is now mandated by the state constitution. Article I, section 28, subdivision (c), of the California Constitution provides: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." (See also *In re Joseph F.* (2000) 85 Cal.App.4th 975, 987 [in Fourth Amendment case, "California's constitutional mandate and legislative scheme relative to school safety render the schools akin to those places and situations in which the courts have recognized that 'administrative searches' are permissible"].) School "officials must be permitted to exercise their broad supervisory and disciplinary powers, without worrying that every encounter with a student will be converted into an opportunity for constitutional review." (*In re Randy G.* (2001) 26 Cal.4th 556, 566.)

While a student's expectation of privacy at school is diminished, it is not extinguished. (*New Jersey v. T.L.O.* (1985) 469 U.S. 325, 338 [83 L.Ed.2d 720, 732]; *In re*

William G., supra, 40 Cal.3d at p. 563.) "The privacy of a student, the very young or the teenager, must be respected." (*In re William G., supra,* 40 Cal.3d at p. 563.) "[A] student always has the highest privacy interests in his or her own person . . . ." (*Ibid*.)

Other factors may reduce the expectation of privacy. In *Hill*, the California Supreme Court found the NCAA's drug testing program, which required that randomly selected college student athletes competing in postseason championships and football bowl games provide closely monitored urine samples to be tested for proscribed substances, did not violate the state constitutional right to privacy. (*Hill, supra*, 7 Cal.4th at p. 9.) The court found students who participated in intercollegiate athletics had a diminished expectation of privacy. (*Id.* at p. 42.) Their activity involved close regulation and scrutiny of physical fitness and bodily condition, required physical examinations and regulation of sleep, diet, fitness and other activities. (*Id*. at p. 41.) Further, athletes frequently disrobe in front of others in locker rooms where private parts are readily observable by others. (*Id*. at pp. 41-42.) There is no showing the CRA's involve the same reduction in an expectation of privacy as athletics with its locker room environment and emphasis on physical fitness.

The District argues all students are already required to undergo physical exams and vaccinations so their expectation of privacy is reduced. In California, however, not all students are subject to these examinations and vaccinations; parents may

refuse to consent to a physical examination (Ed. Code, § 49451) and may object to vaccinations on certain grounds (Health & Saf. Code, § 120365 [contrary to religious beliefs]; Health & Saf. Code, § 120370 [dangerous due to medical or physical condition].)

The *Hill* court also found the student athlete's reasonable expectation of privacy diminished by the program's advance notice and the opportunity to consent to testing. (*Hill, supra*, 7 Cal.4th at p. 42.) The court emphasized that athletic participation was not a government benefit or an economic necessity and plaintiffs had no legal right to participate in intercollegiate athletic competition. (*Id*. at pp. 42-43.)

The trial court found the advance notice and opportunity to consent before signing up for certain CRA's was insufficient. In his deposition in April 2009, Cloney testified the list of CRA's "is being developed" and has been subject to change during the year. He was not sure how parents would know which activities would subject their children to drug testing. While parents were to sign off on consent to drug testing prior to their child's participation in a CRA, this procedure was not always followed. Simonis declared that when he was called out of class for drug testing he did not know why or what was going on and had to call his mother.

Further, participation in CRA's is different than participation in intercollegiate athletic competition. Public secondary education is a government benefit. (*Zobriscky v. Los Angeles County* (1972) 28 Cal.App.3d 930, 933.) "It can no

longer be denied that extracurricular activities constitute an integral component of public education. Such activities are '"generally recognized as a fundamental ingredient of the educational process."' [Citations.] They are '[no] less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens physically, mentally, and morally, than the study of algebra and Latin . . . .' [Citation.]" (*Hartzell v. Connell* (1984) 35 Cal.3d 899, 909, fn. omitted.) "In a variety of legal contexts, courts have emphasized the vital importance of student participation in educational extracurricular programs." (*Ibid*.) Moreover, as discussed in footnote 5, *ante*, participation in some CRA's is part of the curriculum and fulfills a requirement for admittance to state universities.[11]

Although plaintiffs' expectation of privacy is reduced, the trial court did not abuse its discretion in finding that plaintiffs were likely to prevail on establishing a sufficient expectation of privacy to assert a claim for violation of the constitutional right to privacy.

Seriousness of Invasion

In *Hill*, the court noted that not every intrusion of privacy gives rise to a cause of action for invasion of privacy.

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[11] The District does not address this aspect of some CRA's, nor does it address plaintiffs' allegation that plaintiff Jesse Simonis was threatened with expulsion from integrated agricultural biology due to his objection to drug testing. These are factual issues that can be explored at trial.

(*Hill, supra,* 7 cal.4th at p. 37.) "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Ibid*.) In *Loder*, the court found *Hill's* application of this element "makes it clear that this element is intended simply to screen out intrusions on privacy that are de minimis or insignificant." (*Loder, supra,* 14 Cal.4th at p. 895, fn. 22.)

In contrast to *Hill* where the NCAA implemented the drug testing program, here the invasion is by the government not a private individual or company. Public school officials are government agents for purposes of the protection of students' constitutional rights. (*In re William G., supra*, 40 Cal.3d 550, 558-562.) "[T]he pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons." (*Hill, supra*, 7 Cal.4th at p. 38.) Further, the District controls a necessary item--public secondary education. "[I]f a public or private entity controls access to a vitally necessary item, it may have a correspondingly greater impact on the privacy rights of those with whom it deals." (*Id*. at p. 39.)

In *Hill*, the California Supreme Court found direct observation of the athlete's urination "particularly intrusive." (*Hill, supra*, 7 Cal.4th at p. 43.) Here collection of the urine sample is less intrusive as the monitor can only hear, not see, the act of urination. We recognize that a majority of the

United States Supreme Court found the privacy interests invaded by obtaining a student's urine sample for drug testing in similar circumstances to be "negligible." (*Acton, supra*, 515 U.S. at p. 658 [132 L.Ed.2d at p. 577].) However, as Justice Breyer noted in his concurring opinion in *Earls*, "not everyone would agree" and some would find providing a urine sample with someone listening outside the door seriously embarrassing. (*Earls, supra,* 536 U.S. at p. 841 [153 L.Ed.2d at p. 751] (conc. opn. of Breyer, J.).) Plaintiffs provided evidence that this monitored urination was embarrassing. Dalton declared she would be "extremely uncomfortable"; when she was called out of class for a drug test, she "felt shaky and nervous" and one of her friends reported that the testing process made her extremely uncomfortable although her tests were negative. Brown declared it "might be embarrassing" to provide a urine sample while someone is listening.

The District relies on *Smith v. Fresno Irrigation Dist.* (1999) 72 Cal.App.4th 147 (*Smith*), which upheld drug testing of employees in safety-sensitive positions. The *Smith* court found indirect monitoring of the collection process was "a negligible intrusion into the privacy interests." (*Id.* at p. 161.) The court also cited Justice Chin's dissent in *Loder*, in which he stated, "I think it beyond reasonable dispute that City's drug testing program resulted in only a slight, minimal, or 'negligible' intrusion on personal privacy." (*Loder, supra*, 14 Cal.4th at p. 926, (dis. opn. of Chin, J.).) The testing procedures in *Loder* and *Smith* occurred in a separate medical

office; in *Loder* it was part of a required medical examination.[12] (*Loder, supra,* at pp. 853-854; *Smith, supra*, at p. 152; see also *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 183, fn. 2 [employee drug test conducted at medical facility].) Here, the urine sample is collected at school during the school day; the student is pulled out of class, so other students know about the test (and probably the result depending on whether the tested student continues to participate in a CRA). Finally, we cannot discount that teenagers have a greater self-consciousness about their bodies, so monitored urination, like any search of the body, has the potential to cause embarrassment and humiliation. (See *Cornfield by Lewis v. School Dist. No. 230* (7th Cir. 1993) 991 F.2d 1316, 1321, fn. 1; *Horton v. Goose Creek Ind. School Dist.* (5th Cir. 1982) 690 F.2d 470, 479.)

The trial court did not abuse its discretion in finding plaintiffs likely to prevail in establishing a serious, as opposed to de minimis or insignificant, privacy invasion.

Balancing Justification against the Intrusion

Where a case involves a genuine, nontrivial invasion of a privacy interest, it is necessary to weigh and balance the justification for the conduct in question against the intrusion

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[12] There was evidence of an inconsistent application of the drug testing program as to the collection of urine samples. Jesse Simonis was allowed to go to Compliance Associates for his drug test. John Dalton, in a meeting with the school principal, offered to have his daughter Brittany tested at a private drug testing company and supply the District with the results. The principal did not respond to the offer.

on privacy. (*Loder, supra*, 14 Cal.4th at p. 893.) In a state constitutional privacy case, a defendant may prevail by establishing, "as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Hill, supra,* 7 Cal.4th at p. 40.)

The District contends the justification for the expanded drug testing policy is to deter drug use by students and to identify and offer help to those students who use drugs. There is no question that deterring drug use among school children is an important interest. (*Acton, supra,* 515 U.S. at pp. 661-662; *Earls, supra*, 536 U.S. at pp. 839-840 (conc. opn of Breyer, J.).) The question is whether the District's drug testing program, expanded to cover students participating in CRA's, "substantively furthers" this strong countervailing interest. (*Hill, supra*, 7 Cal.4th at p. 40.) The balancing test requires consideration of the means the District has chosen to advance its strong interest in deterring drug use.

The District has not shown a specialized need to target students participating in CRA's for drug and alcohol testing. There was no evidence of a particularly acute problem of drug or alcohol use among students who participated in CRA's, although there was anecdotal evidence that music students used drugs. Cloney testified he had no reason to believe students who participated in certain CRA's are using drugs and alcohol more than those students who did not participate. The therapist who ran the drug diversion program testified that, in her

experience, participation in an extracurricular activity made no difference as to drug use.[13] This lack of evidence is in sharp contrast to *Acton*, where athletes were targeted because they "were the leaders of the drug culture." (*Acton, supra*, 515 U.S. at p. 649 [132 L.Ed.2d at p. 571].) "A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, [citation], would shore up an assertion of special need for a suspicionless general search program." (*Chandler v. Miller* (1997) 520 U.S. 305, 319 [137 L.Ed.2d 513, 526] [striking down Georgia's requirement that candidates for state office pass a drug test].)

The trial court found the District tests students who participate in CRA's simply because it believes it can. "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." Substantial evidence supports the trial court's conclusion. In his deposition, Cloney testified it was important to test those students they were allowed to test, so they tested the math team, the choir, and FFA because they were allowed to. He had not heard the concern that it was dangerous for students to be under the influence while competing in CRA's.

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[13] There is evidence to the contrary. "Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers. [Citation.]" (*Earls, supra*, 536 U.S. at p. 853 [153 L.Ed.2d at p. 759] (dis. opn. of Ginsburg, J.).)

Stupek testified in her deposition that she would support drug testing even if she was presented with information that it did not reduce drug use.

The District, relying on Cloney's declaration, claims the expanded drug testing program is justified because it is aimed at students who participate in CRA's, and all CRA's have unique features that distinguish them from the regular curriculum and make drug testing particularly appropriate. All CRA's involve travel and many pose safety concerns due to the physical activities involved. That declaration, however, conflicts with Cloney's deposition testimony about the reason the students in CRA's were chosen. Based on the record before us, travel and safety concerns were not cited during discovery as the basis for the policy. The differing rationales offered for the expanded drug testing program indicates a disputed factual issue as to the reason for selecting the students tested; the issue is not uncontested as the District claims. Moreover, the District has not shown why safety concerns are greater with respect to all CRA's than as to other activities at school, such as chemistry lab or gym class, that also pose physical risks. Certain CRA's, such as choir, science bowl, and trimathlon, appear to pose no greater safety risk than that faced by all students at school.[14]

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[14] When it was mistakenly concluded that Brittany Dalton had refused a drug test, she was prohibited from playing her flute in the Christmas parade, but allowed to carry a banner. It is difficult to understand how an impaired student would pose a greater danger, to herself or others, playing a flute in a parade than carrying a banner. This action, as well as the

While those participating in CRA's might have less supervision during off-campus events, it is likely those who do not participate in CRA's have less supervision between class and during free periods and during travel for certain non-CRA school activities such as field trips.

The efficacy of the District's random drug testing program on these students is relevant because if the program does not accomplish its alleged goals, then the government's justification for the intrusion is diminished. As shown by the competing expert declarations submitted and the briefs submitted by Amici, the effectiveness of random drug testing to deter drug use is subject to sharp dispute.[15] The District asserts, "Random drug testing reduces drug use by students." The District relies on DuPont's declaration, in which he discussed an unpublished study conducted by his Institute for Behavior and Health. The

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alleged threat to remove Simonis from his biology class, not just from FFA, calls into question--at least as the program is applied--the District's assertion that the expanded drug testing program is not punitive.

[15] As plaintiffs note, the Legislature has weighed in on this dispute on the plaintiffs' side. In 2004, the Legislature passed Senate Bill 1386, which would have added sections 49052 through 49055 to the Education Code and would have limited drug testing in schools to cases of reasonable suspicion. (Sen. Bill No. 1386 (2003-2004 Reg. Sess.) enrolled Aug. 23, 2004.) The Legislature cited studies showing that random drug testing is not an effective deterrent and declared its intent "to ban the costly and ineffective practice of random, suspicionless drug and alcohol testing." (*Id.*, § 1.) The Governor vetoed the bill. (Governor's veto message to Sen. on Sen. Bill No. 1386 (2003-2004 Reg. Sess.) Sen. Daily J. (Oct. 4, 2004) p. 5574 <http://www.leginfo.sen.ca.gov/pub/03-04/bill/sen/sb_1386_vt_20040918.html> [as of Sept. 1, 2010].)

trial court, however, sustained plaintiffs' objection to this study based on lack of foundation and received the study for the limited purpose of providing the basis for DuPont's opinion and not for the truth of the matter. Plaintiffs provided the court with the declaration of Taras, which discussed studies showing random drug testing had little or no effect on drug use and pointed out potential harms from such testing. On this record, the effectiveness of random drug testing on these students cannot be used to justify a program that has little, if any, fit between those chosen to be tested and the need for testing.

The trial court did not abuse its discretion in finding that plaintiffs were likely to prevail on their privacy claim. Since the District does not challenge the trial court's finding as to irreparable harm, the trial court did not abuse its discretion in granting the preliminary injunction. Because the preliminary injunction can be justified based on the privacy claim, there is no need to discuss plaintiffs' constitutional claims relating to search and seizure and equal protection.

Affirming a preliminary injunction is not a decision on the merits of the complaint. (*IT Corp. v. County of Imperial, supra,* 35 Cal.3d 63, 75-76.) It is appropriate to proceed with careful deliberation and allow full exploration of the factual issues raised in this case before reaching a conclusion as to the constitutionality of the District's expanded drug testing program because it involves important privacy rights of school children. "That [schools] 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." (*West Virginia State Bd. of Edu. v. Barnette* (1943) 319 U.S. 624, 637 [87 L.Ed. 1628, 1637].)

DISPOSITION

The judgment (granting the preliminary injunction) is affirmed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (a)(2).)

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.