

Supreme Court No.78946-1

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

HANS YORK and KATHERINE YORK, parents of AARON E. YORK
and ABRAHAM P. YORK, and SHARON A. SCHNEIDER and PAUL
A. SCHNEIDER, parents of TRISTAN S. SCHNEIDER,
Appellants,

v.

WAHKIAKUM SCHOOL DISTRICT NO. 200,

Respondent.

**BRIEF OF AMICI CURIAE WASHINGTON EDUCATION
ASSOCIATION AND DRUG POLICY ALLIANCE IN SUPPORT
OF APPELLANTS**

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Interests of *Amici Curiae**

Amici oppose mandatory suspicionless drug testing of students and are profoundly troubled that such policies like the one at issue are of unproven efficacy and employ tactics that run counter to well-established principles of how educators and parents can best promote healthy choices and life styles among adolescents, particularly those identified as “at risk.” *Amici* are committed to combating adolescent alcohol and drug use, and posit that should this policy be found to run afoul of the Washington State’s constitution, the result will be to advance, not hamper, the District’s – and society’s – legitimate interest in preventing adolescent substance abuse and reducing adolescent alcohol and drug-related harms.

Summary of Argument

At the outset it must be noted that each *amicus curiae* adamantly opposes adolescent alcohol, tobacco and illicit drug use and is fervently committed to reducing such risky behaviors. To this end, *amici* strongly endorse student involvement in extracurricular activities in that such involvement unquestionably *decreases* the likelihood of illegal drug use and promotes the positive development of students to become productive members of society.

* Descriptions of *Amici* are set forth in Appendix A of this brief.

Mandatory suspicionless drug testing policies, however, create unwarranted obstacles to student participation in extracurricular activities and may themselves pose real risks to student health and well-being. First, research has failed to demonstrate that random, suspicionless drug testing of high school students prevents or reduces student alcohol or drug use. As a result, the nation's leading experts in adolescent health have issued "strong reservations" about student drug testing and have increasingly opposed calls for such testing programs.

Research has consistently shown that student involvement in extracurricular activities is highly beneficial to healthy adolescent development and constitutes an important "protective factor" for youth who are at particular risk of substance abuse. Because participation in extracurricular activities helps insulate students from alcohol, tobacco and other drugs, erecting barriers to such participation is counterproductive.

Mandatory drug testing threatens to curb extracurricular participation. By conditioning extracurricular participation on the willingness of students (and the consent of parents) to undergo random drug tests, the policy erects an uncomfortable hurdle for many families who, for instance, oppose intrusion into their medical privacy through the forced disclosure of medications, recoil at the notion of having to urinate while being watched closely, distrust the accuracy and reliability of drug

testing procedures, and/or simply disapprove of a scheme that treats high school students as guilty until proven innocent.

The school drug testing policy, moreover, disrupts the delicate balance of trust and honesty that educators work hard to foster with their students. Teachers and administrators, once potential confidants and counselors for students with questions, concerns, and problems, are cast as drug enforcers and mandated reporters.

Particularly worrisome is that students who are inclined towards drug experimentation may attempt to “beat” the drug test by ingesting substances not detected by the test but which pose even greater dangers to their health than the drugs for which the tests were designed to catch. This dangerous, unintended consequence is a little mentioned but highly pertinent issue that plagues any assessment of drug testing’s purported benefits.

Finally, any discussion of drug testing must take account of the distinct risk of – and harms engendered by – inaccurate drug test results. The accuracy and reliability of drug testing programs is particularly pertinent in the school context, where testing programs operate on very limited budgets and without the benefit of binding guidelines or regulatory oversight.

In sum, student drug testing programs like the District's *cannot* work in the way it is hoped and will, for some adolescents, interfere with more sound drug prevention, detection and treatment processes.

I. Scientific Research Does Not Support the Safety or Efficacy of Random Student Drug Testing

The current state of scientific research fails to support the District's assumption that random, suspicionless drug testing reduces student drug use. As a result, leading experts on adolescent health and their professional associations have steadfastly questioned the wisdom of undertaking such testing. For example, the American Academy of Pediatrics (AAP), an organization of 60,000 pediatricians committed, *inter alia*, to the social health and well-being for all adolescents and young adults, opposes involuntary drug testing of adolescents. Specifically, the AAP's March 2007 addendum to their original policy statement holds it "continues to believe that adolescents should not be drug tested without their knowledge and consent."¹ "In 1996, the AAP published (and reaffirmed in 2006) its policy statement titled 'Testing for Drugs of Abuse in Children and Adolescents' which opposed involuntary testing of adolescents for drugs of abuse."² The AAP policy statement is attached

¹ American Academy of Pediatrics, Committee on Substance Abuse and Council on School Health, *Testing for Drugs of Abuse in Children and Adolescents: Addendum – Testing in Schools and at Home*, 119 PEDIATRICS 627, (2007).

² *Id.*

hereto as Exhibit A. The AAP “believes that more research is needed on both safety and efficacy before school-based testing programs are implemented” and notes that “there is little evidence of the effectiveness of school-based drug testing in the scientific literature.”³ This conclusion mirrors that of the American Medical Association’s Policy Forum statement *Confidentiality and Consent in Adolescent Substance Abuse*.⁴

In fact, the first national large-scale study of student drug testing found no association between school-based drug testing and students’ reported drug use.⁵ Data collected between 1998 and 2001 from 76,000 students nationwide in 8th, 10th and 12th grades led University of Michigan researchers to conclude that drug testing did *not* have an impact on illicit drug use among students, *including athletes*.

Dr. Lloyd D. Johnston, an author of *Monitoring the Future* – the leading federal survey of trends in student drug use and attitudes about drugs – observed that the Michigan study “suggests that there really isn’t an impact from drug testing as practiced I don’t think it brings about

³ *Id.* at 628.

⁴ Melissa Weddle and Patricia K. Kokotailo, *Confidentiality and Consent in Adolescent Substance Abuse: An Update*, Policy Forum, American Medical Association (March 2005) at <http://www.ama-assn.org/ama/pub/category/14690.html> (“There is little evidence of the effectiveness of school-based drug testing in the scientific literature.”)

⁵ Ryoko Yamaguchi, *et al.*, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159-164 (2003).

any constructive changes in [student] attitudes about drugs or their belief in the danger associated with using them.”⁶

The Michigan researchers subsequently conducted a larger study encompassing more schools, more data and with a particular focus on random drug testing programs.⁷ The results of this second study reinforced the researchers’ earlier conclusions:

[D]oes drug testing prevent or inhibit student drug use?
Our data suggests that . . . **it does not**

The two forms of drug testing that are generally assumed to be most promising for reducing student drug use – random testing applied to all students . . . and testing of athletes – **did not produce encouraging results.**⁸

II. Extracurricular Involvement Is Broadly Beneficial and Is a “Protective Factor” for Adolescents at Particular Risk of Substance Abuse

A. Young People Derive Important Benefits from Extracurricular Participation

It would be unwise to “minimiz[e] the importance to many students of . . . participating in extracurricular activities,” *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000), or “the significant place extracurricular opportunities have in the growth of [the Nation’s] high school students.”

Pres. Proc. No. 5109, 48 Fed. Reg. 44,749 (Sep. 27, 1983). It is important

⁶ Greg Winter, *Study Finds No Sign That Testing Deters Students’ Drug Use*, N.Y. TIMES, May 17, 2003.

⁷ Ryoko Yamaguchi, *et al.*, *Drug Testing in Schools: Policies, Practices, and Association With Student Drug Use*, YOUTH, EDUC. & SOC’Y (YES) OCCASIONAL PAPERS SERIES (The Robert Wood Johnson Foundation, Ann Arbor, MI) 2003 at 15-16.

⁸*Id.* at 16 (emphases added).

to recognize the myriad benefits conferred upon adolescents through participation in extracurricular activities (the topic of this section) in order to understand the magnitude of the dangers posed by mandatory student drug testing policies on the development and well-being of high school-aged youth, as discussed in the remainder of this brief.

In numerous surveys, students regularly single out extracurricular activities as a particular source of satisfaction.⁹ Indeed, “[s]tudents participating in a number of activities . . . express greater satisfaction with the *total high school experience* than students who do not participate.”¹⁰

Moreover, “many students . . . wish to pursue post-secondary educational training and/or professional vocations requiring experience [that can be] garnered *only* by participating in extracurricular activities,” *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo. 1998) (emphasis added). Indeed, college-bound students (and their parents) are acutely aware that a strong record of extracurricular involvement is all but essential to securing admission to competitive undergraduate institutions.

Empirical research confirms that students who participate in extracurricular activities are more likely to stay in school, earn higher

⁹ See, e.g., Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?*, 14 J. ADOLESCENT RES. 10, 19 (1999); Philip H. Winne & John Walsh, *Self-Concept And Participation In School Activities Reanalyzed*, 72 J. EDUC. PSYCH. 16 (1980).

¹⁰ Nat’l Fed. of State High School Ass’ns, *The Case For High School Activities* at 5 (“*Case For Activities*”) (emphasis added).

grades, to set more ambitious educational goals and to achieve those goals.¹¹ Additionally, “pro-social” values and habits for success inculcated through participation in extracurriculars transfer to many aspects of life.

Extracurricular involvement plays an important role in protecting students from substance abuse and other risky behaviors. However, the benefits derived from participating in extracurricular activities are needlessly jeopardized when unwarranted obstacles – such as mandatory suspicionless drug testing – are imposed as a condition of participation in such activities.

B. Students Who Participate in Extracurricular Activities Are Far Less Likely to Use Alcohol, Tobacco or Other Drugs Than Are Their Less Involved Peers

Students who participate in athletics are less likely to use illegal substances than those students who do not.¹² Empirical research shows that students who participate in athletics or extracurricular activities are

¹¹ See ECCLES & BARBER, *supra* note 9, at 25 (finding “clear evidence” that participation in extracurricular activities produces higher than expected grade point averages); Joseph L. Mahoney & Robert B. Cairns, *Do Extracurricular Activities Protect Against Early School Dropout?* 33 DEV. PSYCH. 241 (1997); Fred M. Newman, Gary G. Wehlage & Susan D. Lamborn, *The Significance And Sources of Student Engagement* in STUDENT ENGAGEMENT AND ACHIEVEMENT IN AMERICAN SECONDARY SCHOOLS (Fred M. Newman ed., 1992); NAT’L CTR. FOR EDUC. STATS., EXTRACURRICULAR PARTICIPATION & STUDENT ENGAGEMENT (1995).

¹² See Luis G. Escobedo, *et al.*, *Sports Participation, Age at Smoking Initiation and the Risk of Smoking Among US High School Students*, 269 JAMA 1391-5 (1993) (finding that students who participated in athletics were less likely to be heavy/regular smokers than those students who had not participated in athletics).

significantly less likely to develop substance abuse problems and more likely to stay in school and achieve higher grades than their less-involved peers.¹³

Extracurricular participation plays an independent, “protective” role – especially for students who are at high risk.¹⁴ As a 1992 Carnegie Corporation study, “*A Matter Of Time: Risk And Opportunity In The Nonschool Hours*,” documented, 40% of adolescent waking hours are “discretionary,” *i.e.*, not committed to school, homework, employment, or chores.¹⁵ In 2002, 52% of parents of youth in grades 9-12 reported leaving their children without adult supervision after school for several

¹³ See NICHOLAS ZILL, CHRISTINE WINQUIST NORD & LAURA SPENCER LOOMIS, *ADOLESCENT TIME USE, RISKY BEHAVIORS AND OUTCOMES: AN ANALYSIS OF NATIONAL DATA*, U.S. DEP’T OF HEALTH AND HUM. SERV. (1995) (“students who reported spending no time in school-sponsored activities were 49 percent more likely to have used drugs”); Lee Shilts, *The Relationship of Early Adolescent Substance Use to Extracurricular Activities, Peer Influence, and Personal Attitudes*, 26 *ADOLESCENCE* 613, 615 (Fall 1991) (finding that among adolescents studied, “the non[drug]using group reported significantly higher involvement in extracurricular activities as compared to the using and abusing groups”). See Michael D. Resnick, *et al.*, *Protecting Adolescents From Harm: Findings From the National Longitudinal Study on Adolescent Health*, 278, *JAMA* 823, 828-30 (1997) (finding that higher levels of connectedness to school were associated with less frequent alcohol and marijuana use). See also, Maureen Glancy, F.K. Willits & Patricia Farrell, *Adolescent Activities and Adult Success and Happiness: Twenty-four Year Later*, 70 *SOC. & SOC. RES.* 242 (1986).

¹⁴ See, *e.g.*, Laurence Steinberg & Shelli Avenevoli, *Disengagement from School and Problem Behavior in Adolescence: A Developmental-contextual Analysis of the Influences of Family and Part-time Work*, in *NEW PERSPECTIVES ON ADOLESCENT RISK BEHAVIOR* (Richard Jessor, ed., 1998); Margaret E. Ensminger & Hee Soon Juon, *Transition To Adulthood Among High-Risk Youth*, in *NEW PERSPECTIVES ON ADOLESCENT RISK BEHAVIOR* (Richard Jessor, ed., 1998).

¹⁵ See U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., “SAFE AND SMART”: MAKING AFTER-SCHOOL HOURS WORK FOR KIDS (1998), available at <http://www.ed.gov/pubs/SafeandSmart/index.html> (collecting research on disparate rates of drug use, cigarette smoking, violence, and vandalism occurring during this time period).

hours per day.¹⁶ In fact, a vastly disproportionate amount of adolescent drug use and other dangerous behavior occurs during the unsupervised hours between the end of classes and parents' arrival home in the evening.¹⁷

Students who engage in extracurricular activities, however, spend substantial time under adult supervision, thus helping decrease the opportunities and incentives for—as well as the actual incidence of—adolescent drug use and other risky behaviors.¹⁸

Timely adult supervision and structured activity are not the only reasons why extracurricular activities are protective of student well-being. Students also benefit from interaction with peers and teachers/coaches. Through participation, students are able to acquaint themselves with teachers/coaches on a less formal basis, fostering an honest and open relationship.

Extracurricular athletic activities encourage students to make rational decisions and learn responsibility. The increased involvement

¹⁶Afterschool Alliance, *America After 3 PM: Household Survey on Afterschool in America*, Executive Summary (2004), at http://www.afterschoolalliance.org/america_3pm.cfm.

¹⁷See U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., *supra* note 15, at 5-24.

¹⁸See Deborah Cohen, *et al.*, *When and Where do Youths have Sex? The Potential Role of Adult Supervision*, J. AM. ACAD. PEDIATRICS (2002); *see also*, Deborah Cohen, *et al.*, *A Matter of Time: Risk and Opportunity in the Nonschool Hours*, Carnegie Corporation (1992); *see also*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., *supra* note 15; Nat'l Inst. on Out-of-School Time, *Fact Sheet on School-Age Children's Out-of-School Time* (March 2001).

allows the student to bond with other students who have similar interests and gain a sense of pride from succeeding in their chosen activity.

Whether an athletic program or the marching band, students work in close unison to achieve the best outcome possible. In working so closely, the student gains positive social networks, allowing the student to rely on other students and teachers/coaches for support and guidance.¹⁹

III. Random Student Drug Testing Will Operate, Unjustifiably, to *Deny* Important Benefits and Anti-Drug Protections

A. Many Students Find Testing Policies Intensely – or Intolerably – Intrusive on Privacy

Mandatory suspicionless drug testing policies typically require every student selected for a drug test to urinate in a cup under close supervision of test administrators and to disclose to school officials all medications that each student takes. Many students find such requirements embarrassing and humiliating. The sense of anxiety and shame may be experienced far more keenly as adolescents are particularly uncomfortable about their developing bodies and intimate bodily functions.²⁰ These feelings can be heightened by the public way in which

¹⁹ See ECCLES & BARBER, *supra* note 9, at 10, 29 (1999) (“over time, the coalescence of one’s personal identity, one’s peer group, and the kinds of activities one participates in ... can shape the nature of one’s pathway through adolescence.”).

²⁰ Susan Harter, *Causes and Consequences of Low Self-esteem in Children and Adolescents* in SELF-ESTEEM: THE PUZZLE OF LOW SELF-REGARD 87 (Roy Baumeister

students are removed from class or activities for testing. If students test positive they are typically punished through suspension from their extracurricular activity for a set period of time. This chain of events allows students and teachers to easily decipher the results of drug tests, breaking the promises of confidentiality and potentially negatively labeling the student among peers and teachers.

The forced disclosure of medications can result in students having to divulge highly sensitive, even shame-inducing medical conditions (e.g., depression, hyperactivity, HIV and sexually transmitted diseases) about which young people affected often feel uniquely vulnerable.²¹ Pledges of confidentiality cannot eliminate the *risk* (and fear) that their personal medical information will be learned by teachers, and others whose decisions could influence their lives.²²

B. Random Student Drug Testing Deters Students from Participating in Extracurricular Activities

Some students, to be sure, will experience the intrusion and privacy risks related to drug testing as merely annoying, and many more

ed., 1993) (research finding body image is strongest unique predictor of overall feelings of adolescent self-worth).

²¹ See, eg., Allen Crocker, *et al.*, *Supports for Children with HIV Infection in School: Best Practices Guidelines*, J. SCH. HEALTH 64, 32-34 (1994).

²² See *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County, et al., v. Lindsay Earls, et al.*, 536 U.S. 822 (2002) (evidence presented that student's choir teacher was allowed to look at the student's prescription drug list and proceeded to leave the list where other students could read the list).

will consider the intrusions to be troubling, but worth the price of being able to partake in certain extracurricular activities. Still other students, when faced with such intrusions, will choose not to participate.²³

For students whose principles or sense of modesty make the random drug test offensive and unbearable, the losses are great. These students, who need no further reason to say no to drugs, are denied the benefits of athletics or extracurricular activities. They are cut off from school friends who share their interests; they may find themselves the subject of suspicion or rumor concerning what the drug tests would have revealed; and their candidacies for admissions to competitive colleges will be prejudiced by their non-participation.

Of particular concern are the students at the “margins.” Those students whose interest in extracurricular athletic activities may be tentative and undeveloped and who are likely to opt out of extracurricular activities rather than subject themselves to random, suspicionless drug testing because they are more likely to have (or feel they have) something to conceal from their peers and teachers. For example, among the

²³ *Bean v. Tulia Indep.Sch. Dist.*, L 22004511 (N.D. Tex.)(Feb. 18, 2003) (since the implementation of the drug testing program, there has been a dramatic reduction in extracurricular involvement. The court noted one student’s explanation as knowing “lots of kids who don’t want to get into sports and stuff because they don’t want to get drug tested. That’s one of the reasons I’m not into any [activity]. Cause ... I’m on medication, so I would always test positive, and then they would have to ask me about my medication and I would be embarrassed.”)

adolescent populations who are considered at particular risk for substance abuse are young people suffering from depression²⁴ and those with substance abuse problems in their family background. Such students have much to gain from participating in extracurricular activities, and erecting obstacles to their participation carries magnified risks of harm.

This dangerous dynamic is recognized by the National Association of Social Workers, which publicly stated, “[u]sing drug testing as a prevention program not only deters kids least likely to use drugs and alcohol, but it may actually close the only avenue of support for a student seeking to turn away from drug involvement.”²⁵ (The Press Release is attached hereto as Exhibit B.)

IV. Mandatory Suspicionless Drug Testing Is Ill-Suited to the Public Health Purposes It Claims to Fulfill

A. Random Student Drug Testing Undermines Trust in Student-Teacher Relationships while Creating a Hostile School Environment

Mandatory suspicionless drug testing of students disrupts the fragile balance of trust between adolescents and their teachers, coaches, and administrators by creating an adversarial role where students are

²⁴ See e.g., E.Y. Deykin, *et al.*, *Adolescent Depression, Alcohol and Drug Abuse*. 76 AM. J. PUB. HEALTH 178 (1987).

²⁵ Press Release, National Association of Social Workers, *Social Workers Disagree with Supreme Court Decision to Test Students for Drug Use*, (June 27, 2002) (at <<https://www.socialworkers.org/pressroom/2002/062702.asp>>.)

treated as guilty until proven innocent. Such policies also deter students from seeking assistance when it is most needed.

The trust in a traditional student-teacher relationship is jeopardized when teachers, who have traditionally held themselves out to students as potential confidants, are conscripted to police student drug testing procedures. The National Association of Social Workers warns “[d]rug testing ... creates more of a challenge to the recovery from substance abuse and breaks down the walls of trust between student and school—a bond which time and again proves to decrease the likelihood of students participating in risky behaviors.”²⁶ Casting teachers in the role of front-line enforcers can interfere with honest and supportive communication with adults that is critical for struggling adolescents.

B. Drug Testing Regimes May Lead to More Risky Behavior

While many students will react to drug testing with embarrassment, some students will almost certainly harbor *resentment*. Random, suspicionless drug testing is perceived by adolescents as an expression of adult mistrust and suspicion. Such perceptions, in turn, can trigger oppositional behavior—including actions that will enable students to “beat” the test, *i.e.*, defying its drug-use-prevention purpose, while obtaining a “clean” result from the testing laboratory. The American

²⁶ *Id.*

Academy of Pediatrics observes that “it is fairly easy to defeat drug tests, and most drug-involved youth are all too familiar with ways to do so.”²⁷

It should not be assumed that the threat of detection by a random drug test will decrease the risky behavior among students who opt to experiment with alcohol or drugs. Even when administered and validated properly, drug testing provides very limited information about student drug use.²⁸ The standard five-panel drug test has a short window of detection of less than 72 hours for most drugs other than marijuana and does not detect many of the drugs most frequently used by adolescents, such as alcohol, MDMA (Ecstasy), or inhalants.²⁹ The American Academy of Pediatrics warns that mandatory testing “may also motivate some drug-involved adolescents to switch from using drugs with relatively low levels of morbidity and mortality, such as marijuana, to those that are not screened for but which pose substantially greater risks to physical and mental health (for example, inhalants). No studies have yet been conducted on this dangerous unintended consequence of school drug testing, but this very real potential raises questions about the overall efficacy and safety of such policies.”³⁰

²⁷ AAP COMM. ON SUBSTANCE ABUSE AND COUNCIL ON SCHOOL HEALTH, *supra* note 1, at 629.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

V. Drug Testing Is Highly Technical and Fraught with Error

Drug testing is highly technical and imperfect. Myriad problems infect testing techniques and analyses, including the substantial risk of false positive test results, false negative test results, specimen contamination, and chain of custody, storage and re-testing issues.³¹ As the American Academy of Pediatrics notes, few public schools have sufficient resources or trained staff to adhere to the complex, time-consuming and expensive protocols necessary to ensure the reliability of specimens and test results.³²

Unlike federal workplace testing, school-based drug testing is entirely unregulated. There are no binding regulations governing the drug testing of students and no mandatory oversight and accreditation of laboratories that process student tests. As a result, the accuracy and

³¹ Sharon Levy *et al.*, *Drug Testing of Adolescents in Ambulatory Medicine: Physician Practices and Knowledge*, 160 ARCH. PEDIATRIC ADOLESCENT MED. 146, 146-150 (2006). (“Improperly conducted drug tests can result in false accusation (reporting illicit drug use here none exists) or false reassurance (failing to identify actual use.”); Sharon Levy, *et al.*, *A Review of Internet-Based Home Drug Testing Products for Parents*, 113 PEDIATRICS 720, 725 (2004); *citing* R. Schwartz., *Testing for Drugs of Abuse: Controversies and Techniques*, ADOLESCENT MED. 353-370 (1993) (reporting that in a study of more than 2600 urine samples analyzed by certified laboratories using immunoassay procedures as a screening testing with confirmation of positive results, “the false-positive rate was between 2% and 4%” and the “rate of false-negative tests varied from 6% to 40% depending on the drug detected.”)

³² AAP COMM. ON SUBSTANCE ABUSE AND COUNCIL ON SCHOOL HEALTH, *supra* note 1, at 628. *See also*, WEDDLE & KOKOTAILO, *supra* note 4 (“interpretation of testing can also be complicated by false positives and validity questions that arise from the potential adulteration of specimens”);

reliability of school-based drug testing programs is not merely unknown, but potentially unknowable absent universal standards.³³

Accuracy and reliability are essential components of drug testing. A false positive drug test is a devastating accusation for an adolescent. Yet, according to the American Academy of Pediatrics, over-the-counter decongestants can cause false-positive results for amphetamine, and foods with poppy seeds, for example, can trigger positive results for morphine and/or codeine on both the initial screen and confirmation tests.³⁴

VI. Random Student Drug Testing Policies Do Not Respect the Proper Allocation of Responsibility among Parents, Doctors, and Schools

School policies that require students to submit to an in-school urine testing regime do not respect the judgment of doctors and treatment experts—or the wishes of parents. The urine screen is administered under circumstances when testing is considered medically inappropriate³⁵ and in

³³ See SHARON LEVY (2006) *supra* at note 31 at 146 (“The federal government has established extensive national drug testing guidelines, including supervision of all federally mandated drug testing programs by a physician certified as a medical review officer by the Medical Review Officer Certification Council to protect employees and employers from the consequences of incorrect information. Adolescents, however, are far more likely to have drug testing performed by a physician who does not have medical review officer training.”)

³⁴ AAP COMM. ON SUBSTANCE ABUSE AND COUNCIL ON SCHOOL HEALTH, *supra* note 1, at 629.

³⁵ Sharon Levy, *et al.*, *A Review of Internet-Based Home Drug Testing Products for Parents*, 113 PEDIATRICS 720, (2004) (“The American Academy of Pediatrics (AAP) [and] the American Medical Association... have statements that pertain to drug testing of adolescents [and] recommend drug testing as an adjunct to an evaluation performed by a qualified professional rather than as a screening tool to be applied to an entire population.”)

a manner that departs from professional norms—without regard for the student’s or parents’ wishes or the medical judgment of his pediatrician. A 2006 national survey found that 83 percent of physicians (pediatrics, family medicine, and adolescent medicine) surveyed disagree with drug testing in public schools.³⁶

Such policies are not respectful of the delicate student-parent relationship, where a false positive will result in the mandatory disclosure of all prescription medications even where a parent may be unaware of such medications. A parent may be unaware of birth control medication or medications relating to his/her child’s mental/sexual health.³⁷ If a student does not want her use of birth control pills relayed to her parents, she is forced to not participate in extracurricular athletic activities for fear of a random drug test jeopardizing her privacy interests. A policy forum statement published by the American Medical Association found that “[m]ost physicians ... recognize that within some relationships, parents’ knowledge of substance use or sexual activity can hinder the minor’s treatment and might lead to punishment or abuse.”³⁸

³⁶ Sharon Levy *et al.*, *Drug testing in General Medical Clinics, in School and at Home: Physician Attitudes and Practices*, 38 J. OF ADOLESCENT HEALTH 336-342 (2006).

³⁷ See WEDDLE & KOKOTAILO, *supra* note 4 (“Most states subsequently added laws that allowed minors to consent to one or more of the following: alcohol and substance abuse treatment, mental health care, and contraception.”).

³⁸ *Id.*

Mandatory urine testing of students overrules the judgment of parents who, for a variety of reasons, would want their children to participate in extracurricular activities, but *not* its testing regime. However, policies such as the one at issue do not allow for parental control over the invasive technique of random student drug testing and displace parental authority relating to the important and serious issue of their child's health and well-being.

Conclusion

For the reasons stated above, *amici* request that the Court find Policy 3515 unconstitutional.

Respectfully submitted this 6th day of April, 2007.

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APPENDIX A

DESCRIPTION OF *AMICI CURIAE*

Amicus Curiae **The Washington Education Association** (WEA) is the Washington state affiliate of the National Education Association that represents 80,000 education employees in the State of Washington. The WEA represents educators from every school district in the State of Washington as well as numerous community colleges and four year colleges. The WEA advocates on behalf of the children of the State of Washington. It is the WEA's position, as borne out by vast empirical research, that random student drug testing programs are actually harmful to children, in that they inevitably act to encourage, rather than discourage, drug use among schoolchildren.

Amicus Curiae **Drug Policy Alliance** ("the Alliance") is dedicated to broadening the public debate over drug use and regulation and to advancing realistic policies, grounded in science, compassion, public health, and respect for human rights and individual autonomy. The Alliance is a non-profit, non-partisan organization with more than 25,000 members and active supporters nationwide. Through its Office of Legal Affairs, the Alliance has participated as *amicus* counsel for national medical and public health groups, physicians, educators, social workers, substance abuse treatment providers, and child advocates in opposition to the policy of random student drug testing before the Supreme Court.

EXHIBIT A



Testing for Drugs of Abuse in Children and Adolescents: Addendum—Testing in Schools and at Home

Committee on Substance Abuse and Council on School Health

Organizational Principles to Guide and Define the Child Health Care System and/or Improve the Health of All Children

ABSTRACT

The American Academy of Pediatrics continues to believe that adolescents should not be drug tested without their knowledge and consent. Recent US Supreme Court decisions and market forces have resulted in recommendations for drug testing of adolescents at school and products for parents to use to test adolescents at home. The American Academy of Pediatrics has strong reservations about testing adolescents at school or at home and believes that more research is needed on both safety and efficacy before school-based testing programs are implemented. The American Academy of Pediatrics also believes that more adolescent-specific substance abuse treatment resources are needed to ensure that testing leads to early rehabilitation rather than to punitive measures only.

BACKGROUND

In 1996, the American Academy of Pediatrics (AAP) published (and reaffirmed in 2006) a policy statement titled “Testing for Drugs of Abuse in Children and Adolescents,” which opposed involuntary testing of adolescents for drugs of abuse.¹ The policy statement also stated that laboratory testing for drugs under any circumstances is improper unless the patient and clinician can be assured that the test procedure is valid and reliable and patient confidentiality is ensured. This policy statement was published shortly after a 1995 US Supreme Court ruling (*Vernonia v Acton* [515 US 646]) held that random drug testing of high school athletes is constitutional. Since that time, national interest in school-based drug testing has increased. In June 2002, the US Supreme Court, in a 5-to-4 decision, ruled that public schools have the authority to perform random drug tests on all middle and high school students participating in extracurricular activities (*Board of Education v Earls* [536 US 822, 122 S Ct 2559, 153 L Ed 2 days 735 {2002}]). Writing for the majority, Justice Clarence Thomas wrote, “Testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring and detecting drug use.” Shortly after this Supreme Court ruling, the President’s Office of National Drug Control Policy published a guidebook designed to encourage schools to incorporate drug-testing policies for all students.²

Interest in drug testing of adolescents reaches beyond public schools. During recent years, a substantial number of companies have begun to market home

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All policy statements from the American Academy of Pediatrics automatically expire 5 years after publication unless reaffirmed, revised, or retired at or before that time.

Key Words

adolescence, substance-related disorders, substance abuse detection

Abbreviation

AAP—American Academy of Pediatrics
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drug-testing products directly to parents.³ Products that identify alcohol and drugs in urine, saliva, and hair are now available at retail outlets and via the Internet. Pediatricians may be asked about home drug testing by parents of their adolescent patients. Pediatricians involved in school health may be asked to assist in implementing school-based drug-testing programs. For these reasons, the Committee on Substance Abuse has conducted a review of the available science on drug testing of adolescents and is issuing this addendum to the 1996 policy statement. Although much has been written on the pros and cons of testing adolescents for drugs, relatively little has been published in peer-review scientific journals.

BENEFITS AND RISKS OF DRUG TESTING IN SCHOOLS AND AT HOME

School- and home-based drug testing poses a number of potential benefits and risks. On the positive side, both procedures would likely increase the number of adolescents who are screened for use of illicit drugs. Population-based screening also offers the potential for providing early intervention and treatment services to more adolescents. The Office of National Drug Control Policy guidebook states: "Results of a positive drug test should not be used merely to punish a student. Drug and alcohol use can lead to addiction, and punishment alone may not necessarily halt this progression. However, the road to addiction can be blocked by timely intervention and appropriate treatment."² Proponents of drug testing also claim that the existence of a school- or home-based drug-testing program will help adolescents refuse drugs and provide legitimate reasons to resist peer pressure to use drugs, although these claims are not yet proven. On the negative side, drug testing poses substantial risks—in particular, the risk of harming the parent-child and school-child relationships by creating an environment of resentment, distrust, and suspicion.⁴ In addition to the effects on the individual adolescent, the safety and efficacy of random drug testing requires additional scientific evaluation. Broad implementation of random drug testing as a component of a comprehensive drug-use prevention program should await the results of these studies.

Currently, there is little evidence of the effectiveness of school-based drug testing in the scientific literature. Goldberg et al⁵ compared 2 schools, one of which implemented a mandatory drug-testing program for student athletes and the other of which did not. They found at follow-up that the use of illicit drugs, but not alcohol, was significantly lower among athletes who were drug tested. However, they also found that athletes who were drug tested experienced an increase in known risk factors for drug use, including an increase in normative views of use, belief in lower risk of use, and poorer attitudes toward the school.

A larger observational study by Yamaguchi et al,⁶ which analyzed data from the national Monitoring the Future study, found no association between school-based drug testing and students' reports of drug use. Among the nationally representative group of more than 300 schools, drug testing was most commonly conducted "for cause" (ie, suspicion; 14% of schools) and was far less commonly required for student athletes (4.9% of schools) or students participating in other extracurricular activities (2.3% of schools). Regardless of the reason it was performed, drug testing was not significantly associated with reduction in the use of marijuana or any other illicit drug among students in any grade studied (ie, 8th, 10th, or 12th grade). However, 1 observational study is not sufficient to establish causation or lack of causation. In addition, no detail was provided regarding the extent of drug testing in the study schools, and at some schools, it may have been minimal. Further scientific investigation is warranted.

Laboratory testing for drugs of abuse is a technically complex procedure. To ensure the validity of the specimen, urination must be directly observed, which is a potentially embarrassing procedure for all involved, or the collector must use a fairly complex and expensive federally approved protocol, which involves documentation of a continuous chain of custody in handling and includes temperature testing and controls for adulteration and dilution.⁷ Few schools will have sufficient staff with proper training to implement these costly procedures, and a recent survey of pediatricians, adolescent medicine specialists, and family physicians found that few physicians will be able to help, because less than 25% are familiar with proper procedures for collection, validation, and interpretation of urine drug tests.⁸ Similarly, most parents cannot implement the federal collection protocol and, for ethical and developmental reasons, should not directly observe their teenaged children urinating. Although drug testing of hair and saliva is available, validity has not been firmly established. Questions remain regarding how passive exposure to drugs as well as differences among races and sexes can affect hair testing.⁹⁻¹² In addition, hair testing is more likely to be useful in detecting historical drug use rather than current use.^{9,13} Oral fluid testing (ie, saliva or oral swab), by contrast, gives a more accurate picture of current use.¹⁴ However, accuracy of oral fluid testing varies across drugs of abuse. Oral fluid testing performs well in detecting the use of opiates and methamphetamine, but it performs poorly in detecting the use of benzodiazepines and cannabinoids.¹⁵⁻¹⁷

Interpretation of drug tests can also be complex. School staff members and/or parents need to be able to assess possible false-positive results, especially when screening test results are positive for amphetamines or opioids. Over-the-counter cold medications containing pseudoephedrine can cause false-positive screening re-

sults for amphetamine, although follow-up testing with gas chromatography and mass spectrometry is highly specific and can reliably confirm the presence of amphetamine.¹⁷ Ingestion of foods that contain poppy seeds makes interpretation of drug testing more difficult, because it can cause screening and gas chromatography and mass spectrometry results to be falsely positive for morphine and/or codeine.¹⁸

It is fairly easy to defeat drug tests, and most drug-involved youth are all too familiar with ways to do so. Even properly collected specimens must have checks for validity (eg, urine specific gravity and creatinine), because the easiest way to defeat a drug testing is by simple dilution.¹⁹ Even when properly collected and validated, urine drug tests yield very limited information. With the exception of marijuana, the window of detection for most drugs of abuse is 72 hours or less.¹⁹ Therefore, negative test results indicate only that the adolescent did not use a specific drug during the past several days. Even adolescents with serious drug problems may have negative test results on most occasions.²⁰ Standard drug-testing panels also do not detect many of the drugs most frequently abused by adolescents, such as alcohol, ecstasy (3,4-methylenedioxymethamphetamine [MDMA]), and inhalants, and information on the limitations of screening tests and ways to defeat them is widely available to adolescents via the Internet.³ Widespread implementation of drug testing may, therefore, inadvertently encourage more students to abuse alcohol, which is associated with more adolescent deaths than any illicit drug but is not included in many standard testing panels. Mandatory drug testing may also motivate some drug-involved adolescents to change from using drugs with relatively less associated morbidity and mortality, such as marijuana, to those that pose greater danger (eg, inhalants) but are not detected by screening tests. No studies have yet been conducted on this important issue. Safety of randomly testing adolescents for the use of drugs should be scientifically established before it is widely implemented.

Drug testing may also be perceived by adolescents as an unwarranted invasion of privacy. A policy statement is being developed by the Council on School Health on the role of schools in combating substance abuse. It will discuss the potential risks of school-based drug testing and alternative approaches to school-based prevention of drug abuse. Few physicians support school-based testing of adolescents for drugs; a national survey of physicians (pediatrics, family medicine, and adolescent medicine) found that 83% disagreed with drug testing in public schools.²⁰

A key issue at the heart of the drug-testing dilemma is the lack of developmentally appropriate adolescent substance abuse and mental health treatment.²¹ Adequate resources for assessment and treatment must be available to students who have positive test results. However,

many communities lack substance abuse treatment services dedicated to adolescents, and adult substance abuse treatment programs may be inappropriate and ineffective for adolescents.²¹ Federal support for school-based drug testing should include an allocation of resources that will facilitate greater access to adolescent substance abuse treatment.

ADDITIONAL CONCLUSIONS AND RECOMMENDATIONS

1. The AAP supports rigorous scientific study of both the safety and efficacy of school- and home-based drug testing of adolescents.
2. The AAP recommends that school- and home-based drug testing not be implemented before its safety and efficacy are established and adequate substance abuse assessment and treatment services are available.
3. The AAP encourages parents who are concerned that their child may be using drugs or alcohol to consult their child's primary care physician or other health professional rather than rely on school-based drug screening or use home drug-testing products.
4. The AAP recommends that health care professionals who obtain drug tests or assist others in interpreting the results of drug tests be knowledgeable about the relevant technical aspects and limitations of the procedures.

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EXHIBIT B



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April

June 27, 2002
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Social Workers Disagree with Supreme Court Decision to Test Students for Drug Use

WASHINGTON—The Supreme Court’s decision today to allow drug testing in schools sets a precedent, no matter how well intentioned, that social workers believe is both invasive and counterproductive to combating drug and alcohol abuse in schools.

Thousands of social workers nationwide devote their lives to understanding, preventing, and treating substance abuse. School social workers focus primarily on helping students succeed; creating a safe and supportive learning environment for students to get the education they deserve and need. Policies such as this one deny participation in a broad range of extra-curricular activities for those students who refuse to submit to “suspicionless” drug testing—regardless of whether that decision was based on principle or modesty. They are, in essence, guilty until proven innocent. Empirical evidence, however, continues to show that students who participate in extra-curricular activities are least likely to be involved with alcohol and drugs, or any other “risky behaviors.”

“We are disappointed by the Supreme Court’s ruling today. Social workers, concerned with a child’s well-being, question whether this policy will do more harm than good,” says Elizabeth J. Clark, PhD, ACSW, MPH, Executive Director of the National Association of Social Workers, “What programs are in place for prevention, and what happens to the child if a test comes back positive—what steps will be taken to keep this child involved in school and to treat the problem, as well as prevent it from happening again?”

“What is most effective in keeping kids away from drugs and alcohol are substance abuse prevention programs based on scientific research,” adds Clark.

Using drug testing as a prevention program not only deters kids least likely to use drugs and alcohol, but it may actually close the only avenue of support for a student seeking to turn away from drug involvement. Drug testing, in the manner allowed today by the Supreme Court, creates more of a challenge to the recovery from substance abuse and breaks down the walls of trust between student and school—a bond which time and again proves to decrease the likelihood of students participating in risky behaviors.

Clark adds, “Drug testing in this manner disregards the importance of prevention and treatment which social workers view as fundamental to helping kids make smart decisions and succeed in life.”

Media Outlets: For more information or to interview a school social worker on drug testing in schools or school social work please contact Lahne Mattas-Curry at 202-336-8228 or lcurry@naswdc.org.

The National Association of Social Workers (NASW), in Washington, DC, is the largest membership organization of professional social workers with 153,000 members. It promotes, develops and protects the practice of social work and social workers. NASW also seeks to enhance the well being of individuals, families and communities through its work and through its advocacy.

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