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VIA FIRST CLASS MAIL & EMAIL

October 6, 2017

Ronnie Ferber Konner, President
Livingston Township Board of Education
11 Foxcroft Drive
Livingston, New Jersey 07039
RKonner@livingston.org

RE: Random Student Drug Testing Policies

Dear Ms. Konner and Members of the Board of Education:

On behalf of the American Civil Liberties Union of New Jersey, we write to offer background and guidance on random student drug testing policies in our state. We understand that the district is considering whether to implement a random drug testing policy. It is our aim that this letter serve as a resource in your ongoing efforts to provide students the most positive learning environment.

The ACLU of New Jersey opposes random drug testing policies in school districts because they are invasive and counter-productive. Presently, there is no concrete evidence suggesting that random drug tests deter drug use among students. The American Academy of Pediatrics (AAP) recommends against such programs for this reason.¹ In fact, random drug testing may have the counterintuitive effect of contributing to drug use. Studies show that participation in extracurricular activities is correlated with abstinence from drugs.² Policies that condition participation on submission to random drug testing deny its benefits to students who decline to submit—whether out of principle, embarrassment, fear, or otherwise. And where suspension from extracurricular activities is the penalty for failing a random drug test, students who have the most to gain from participation are shut out.

Moreover, random drug testing erodes trust between students and educators and makes young people into perpetual suspects on school grounds. Promoting students' sense of safety and security is plainly valuable in its own right, but it also has desirable consequences related to student drug

¹ Sharon Levy & Miriam Schizer, *Adolescent Drug Testing Policies in Schools*, 135 PEDIATRICS 782-83 (April, 2015), <http://pediatrics.aappublications.org/content/pediatrics/early/2015/03/25/peds.2015-0054.full.pdf>.

² 80% of studies in a longitudinal review indicated that sports participation is correlated with reduced illicit drug use. Matthew Kwan et al., *Sport participation and alcohol and illicit drug use in adolescents and young adults: A systematic review of longitudinal studies*, 39 ADDICTIVE BEHAVIORS 497-506 (2014), <http://www.sciencedirect.com/science/article/pii/S0306460313003766>.

use. A study comparing strategies for addressing drugs in schools found that the threat of drug testing was not associated with reduced drug use, whereas perceived positive school climate was.³

Beyond efficacy and outcomes, random drug testing policies implicate students' core constitutional rights. The Fourth Amendment of the United States Constitution and its analogue in our state constitution prohibit "unreasonable searches and seizures." Generally, only a search made pursuant to a warrant supported by probable cause will be reasonable. The law, therefore, takes a skeptical view of warrantless, suspicionless searches. A random drug test constitutes such a search and will pass constitutional muster only upon a showing that the search serves "special needs."

The ACLU of New Jersey challenged a random drug testing programs in *Joye v. Hunterdon Central Regional High School Board of Education*.⁴ The Court permitted random drug testing in limited circumstances, setting forth a rigorous "special needs" analysis that takes into account students' expectation of privacy, the search's degree of intrusiveness, and the strength of the school district's asserted need in conducting the search. In allowing Hunterdon Central's random drug testing program to continue, the court took pains to emphasize that its decision is "not to be construed as an automatic green light for schools wishing to replicate Hunterdon Central's program. Instead, those schools will have to base their intended programs on a meticulously established record."⁵ Following *Joye*, random student drug testing programs in New Jersey must clear that bar.

Several factors aligned in *Joye* to convince the court that the school's program was supported by "special needs." First, the Board of Education presented extensive evidence of a large-scale drug problem within the school. The Board documented the problem through, *inter alia*, anonymous and controlled student surveys, certified statements from school personnel describing first-hand experiences of students using drugs on school grounds, a 33% increase in the drug-related workload of a student assistance counselor, and three heroin overdose deaths in municipalities served by the school district. Second, testing protocols were tailored to minimize privacy intrusions. For example, students provided urine samples in closed-door restrooms without being observed directly by adult monitors, systems guarded against false positives, a limited subset of students were subject to testing, conscientious objectors were free to opt out without facing expulsion, and "[p]erhaps most important, no student is exposed to criminal liability."⁶ The court explicitly "left open the possibility that a future program will not pass constitutional muster either because the school's chosen method of specimen collection is overly intrusive in view of alternative methods, or because the underlying drug and alcohol use at the particular school simply is inadequate to justify it."⁷

³ Sharon R Sznitman & Daniel Romer, *Student Drug Testing and Positive School Climates: Testing the Relation Between Two School Characteristics and Drug Use Behavior in a Longitudinal Study*, 75 JOURNAL OF STUDIES ON ALCOHOL AND DRUGS 65–73 (2014), <http://www.jsad.com/doi/10.15288/jsad.2014.75.65>.

⁴ 176 N.J. 568 (2003).

⁵ *Id.* at 616.

⁶ *Id.* at 615.

⁷ *Id.* at 574.

For example, a preemptive program not targeted to a specific, documented drug problem would likely be unconstitutional following *Joye*. A “special need” is, by definition, an exceptional showing; it speaks to an exigency beyond the standard mandate of all schools to safeguard students. The generic desire to deter drug use, without proof of a serious, existing drug problem, does not rise to the level of a “special need.” See *Theodore v. Delaware Valley Sch. Dist.*, 575 Pa. 321, 352 (2003) (citing *Joye* in holding that “the general need to deter drug use among students” absent “evidence of an existing drug problem as well as the success and/or failure of other means adopted to eradicate the problem” did not justify random, suspicionless drug and alcohol testing). Schools are free to pursue any number of preventative measures to address student drug use before it ripens into an acute problem, but random drug testing—given its uniquely invasive quality and attendant constitutional implications—cannot be one of those measures.

A final and critical factor in the court’s analysis in *Joye* was the measured, incremental approach the school had taken in response to the drug problem it faced. Its random testing program was adopted only after “a meticulous two-year process” during which the Board “appointed a task force to review the relevant issues, commissioned two studies by an outside firm, held public hearings to elicit the community’s views, and considered the other information contained in the record.”⁸ In other words, the random testing program was a final resort devised with input and data from numerous sources. “Those deliberate steps” persuaded the court that the school’s policy “reflects a reasoned attempt by the Board and approving parents to address a documented drug-and-alcohol problem.” *Joye*, 176 N.J. at 613 (2003).

In addition to the constitutional constraints outlined in *Joye*, the New Jersey Department of Education has promulgated regulations related to the adoption, implementation, and scope of random drug testing programs. For example, a district’s board of education must hold a public hearing before establishing a random alcohol or drug testing policy, the policy may apply only to students in grades nine through twelve who participate in extracurricular activities or possess school parking permits, the board must assume all costs associated with the program, and all students and parents must receive written notice at the beginning of each school year that their consent to random student alcohol or drug testing is a prerequisite for participating in extracurricular activities or possessing a parking permit.⁹ Boards must also produce a comprehensive written policy statement setting out the purposes of the testing program; reciting a statistically sound process for selecting random subjects; describing the monitoring and transporting of tested students and the chain of custody practices for test specimens; noting the standards for confidentiality and disclosure of testing information; prohibiting the sharing of test results with law enforcement; limiting the actions taken against students who test positive or refuse to submit to exclusion from extracurricular activities or denial of parking privileges; providing a method for contesting positive results; and putting forward guidelines for making referrals to outside treatment providers.¹⁰

As you can tell, constitutional and regulatory controls place a heavy burden on schools seeking to adopt random student drug testing programs. And as research continues to cast doubt on the

⁸ *Id.* at 652.

⁹ N.J.A.C. 6A:16-4.4 (a)

¹⁰ N.J.A.C. 6A:16-4.4 (b)

effectiveness of random drug testing in addressing student drug use, justifying a testing program based on need grows more complex and questionable by the day.

Please contact us if we can provide you any additional information. Thank you very much for your attention to this important matter.

Sincerely,



Edward L. Barocas
Legal Director



Liza Weisberg
Law Fellow

cc: Christine Steffner (via email only)