

SWEET | STEVENS | KATZ | WILLIAMS

Lawyers for education.

IS RANDOM STUDENT DRUG TESTING IN SCHOOLS PERMISSIBLE UNDER THE PENNSYLVANIA CONSTITUTION?

There is a continuing debate over whether random drug tests of students in schools is constitutional. Drug use among students in American public schools is a recognized problem, and in order to deter drug use among students, many school districts have developed random drug testing policies for students participating in extracurricular and athletic activities.

In June, 2002, the United States Supreme Court approved random drug tests under the U.S. Constitution for several categories of public high school students. The Supreme Court ruled in *Board of Education of Independent Schools, District No. 92 of Pottawatomie County et al. v. Earls et al.* 536 U.S. 822 (2002), that the school's interest in ridding its campuses of drugs outweighs students' right to privacy. In *Earls*, a former Oklahoma high school honor student who competed on an academic quiz team and sang in the school choir was randomly drug tested. Although she tested negative, Ms. Earls sued over what she called a humiliating and accusatory policy.

The Supreme Court's 5-4 decision in *Earls* allows the broadest drug testing of students the Court has yet permitted. More importantly, the Supreme Court held that school authorities need not have any particular reason to suspect wrongdoing in order to conduct random drug tests of students in athletics or extracurricular activities based on general concerns for the student populous. The *Earls* decision allows schools to randomly drug test any student who joins after school activities or teams, a category that includes many, if not most, middle school and high school students. Previously, the U.S. Supreme Court allowed random drug testing of student athletes in *Vernonia School District v. Acton*, 515 U.S. 646 (1995). But in that case, the Court did not address testing students involved in non-sport extracurricular activities.

Although the U.S. Supreme Court has held that random drug testing of various categories of students without any evidence of wrongdoing based on general concerns for the student populous is constitutional under the U.S. Constitution, the Pennsylvania Supreme Court's decision, to the contrary, in *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2001), is the law in Pennsylvania. In *Delaware Valley*, the Court held that random drug testing of students who participate in extracurricular activities is not permissible unless school authorities make some actual showing of a "specific need" for the random drug testing based on the greater protection that Pennsylvania's Constitution provides to students than does the United States Constitution.

While the Court in *Delaware Valley* held that random drug testing of any student who participates in an extracurricular activity is unconstitutional absent some actual showing of a "specific need," the Commonwealth Court also suggested that random drug testing of a student athlete under Pennsylvania law may be constitutional depending on the risk of harm to a student athlete, or to others, if a student athlete participates in a sport while under the influence of drugs or alcohol. Additionally, evidence of an existing drug problem as well as the success and/or failure of other means adopted to eradicate the problems may establish a "specific need" for the random testing.

SWEET | STEVENS | KATZ | WILLIAMS

Lawyers for education.

At least one court in Pennsylvania has upheld suspicionless random drug testing of students who engage in extra-curricular activities based upon the school's documented need to reduce drug use. In that case, *Fagano v. Loyalsock Twp. School District* (Lycoming Cty), the school district presented credible evidence of increasing drug use within the school district. The court also credited the District procedurally for acting in good faith – by appointing a committee, soliciting public input, and by holding public meetings on the topic.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.