IN THE COURT OF COMMON PLEAS OF
PIKE COUNTY, PENNSYLVANIA
CIVIL DIVISION

M.K. and A.K., minors, by and through their parents, GLENN and KATHY KIEDERER,	:	
Plaintiffs,	:	
vs	:	**No. 434-2011 - Civil**
THE DELAWARE VALLEY SCHOOL DISTRICT,	:	
Defendant.	:	

ORDER

AND NOW, this 21st day of July, 2011, upon consideration of the Plaintiffs' Motion for Preliminary Injunction seeking to enjoin Defendant from enforcing the initial testing and random testing provisions of Delaware Valley School District Policy 227.1, briefs in support and opposition thereof, and following a hearing held thereon, Plaintiffs' Motion is hereby GRANTED.

I. Background

The Plaintiffs, M.K. and A.K. ("Plaintiffs"), filed a Complaint in equity by and through their parents, Glenn and Kathy Kiederer, on March 9, 2011. The Complaint alleges that Delaware Valley School District's ("DVSD") Policy 227.1, which requires random drug testing of all students involved in extracurricular activities and athletics, as well as those who wish to drive and park at the school, is a violation of their rights under Article I, Section 8 of the Pennsylvania Constitution. Plaintiffs cite *Theodore v. Delaware Valley School District*, 575 Pa. 321, 836 A.2d 75 (Pa. 2003) as supporting their claim that the policy is unconstitutional. In that opinion, the Pennsylvania Supreme

Court affirmed the Commonwealth Court's reversal of this Court's approval of a previous and similar drug testing policy by DVSD. Because of the early stage of that litigation, the Court concluded that DVSD never made a sufficient showing of a need for drug testing the targeted students or a belief that random drug testing of the targeted students would be effective. *See id.* Absent such proof, the policy would violate Article I, Section 8 of the Pennsylvania Constitution and therefore the Court concluded that the case had to proceed to determine if such proof existed.

Plaintiffs' herein have filed a similar lawsuit and have now filed a Motion for Preliminary Injunction to enjoin Defendant and its employees, officers, and agents from enforcing Policy 227.1 (interchangeably referred to as "the Policy"). Policy 227.1 allows for five kinds of drug and alcohol screening of Delaware Valley students in middle school and high school: initial testing; random testing; reasonable-suspicion testing; return-to-activity testing; and follow-up testing. *See* Plaintiffs' Exhibit 1, p. 3. The initial testing and random testing provisions of the Policy require students in middle school and high school to pass the drug test in order to participate in co-curricular activities and/or to obtain a parking pass. *See id.* According to the Policy, "[c]o-curricular participation shall include all interscholastic athletics, clubs, and other activities in which students participate on a voluntary basis and for which credit is not awarded toward meeting graduation requirements." *Id.*

The consent form for Policy 227.1 authorizes DVSD to demand a urine sample from the student at any time during the school year or interscholastic season and have those samples tested for certain drugs and other substances. *See id.* at 4. Urine samples are collected by school nurses who stand right outside the stall while the student fills a

cup with urine specimen. *See* N.T. 6/13.11, p. 42-43. The Policy also authorizes the release of urinalysis results to "the student, his/her parents/guardians, and a limited class of school personnel who have a need to know: athletic director; the principal; the student assistance team; the substance abuse professional who works with the student; the guidance counselor, the coach and/or advisor; otherwise known as the implementation committee." Plaintiffs' Exhibit 1 at 6.

The Policy states that it is designed to accomplish four things: (1) prevent student participants in co-curricular programs and students with driving privileges from using drugs; (2) protect the health and safety of students; (3) prevent accidents and injuries, resulting from the use of alcohol or controlled substances; and (4) provide drug and alcohol users with assistance programs. *See id.* at 1-2. Nothing in the Policy's statement of purpose identifies a current drug or alcohol problem within the school district nor does it suggest that the class of students targeted for random testing were the source of any drug or alcohol problems.

Plaintiffs in this matter are M.K. and A.K., two students in the Delaware Valley School District. M.K. just completed seventh grade at Delaware Valley Middle School. A.K. just completed ninth grade at Delaware Valley High School. A hearing on the Plaintiffs' Motion for a Preliminary Injunction was held on June 13, 2011.

At the hearing, M.K. testified that she had participated in several elementary school plays and now wants to be in the drama club in the middle school. *See* N.T. 6/13/11, pp. 28-32. She also stated that she is interested in soccer, softball, cooking club and the Students Against Substance Abuse club ("SASA"), but is unable to participate

because of her refusal to submit to a drug test. *See id.* M.K. testified that she gets good grades in school and has not had any disciplinary problems. *See id.* at 29.

A.K. testified that she would like to participate in scrapbooking club, art club, tennis and softball at the high school but is unable to do so without submitting to a drug test. *See id.* at 20. A.K. specifically mentioned that she would like to play volleyball which starts in the fall. *See id.* at 23. She also testified that she wanted to participate in extracurricular activities because she believed they would help her get into a good college. *See id.* at 19. A.K. also testified to getting good grades in school and not having disciplinary problems. *See id.* at 18.

The girls' father, Glenn Kiederer, also testified at the hearing regarding the Preliminary Injunction. Mr. Kiederer stated that he was surprised and concerned that his children would be required to be drug tested in order to participate in extracurricular activities. *See id.* at 8-9. After speaking with several school officials he decided not to sign the consent form for his daughters and, as such, his children have not been allowed to participate in extracurricular activities at school but have participated in activities outside of school, such as Girl Scouts. *See id.* at 12-15.

Plaintiffs allege that because they do not wish to compromise their privacy rights by allowing DVSD to drug test them they have suffered and will continue to suffer irreparable harm due to the Policy. Plaintiffs also assert that DVSD did not analyze drug and alcohol use by students involved in extracurricular activities, have not pointed to a specific drug problem within the school district, nor has it demonstrated whether the Policy has effectively deterred drug problems in the District. This decision follows.

II. Discussion

Plaintiffs in the matter are entitled to a Preliminary Injunction. In order to obtain a Preliminary Injunction the requesting party must show several things. Specifically,

> The party seeking the injunction must show first that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it . . . and that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Summit Town Centre, Inc. v. Shoe Show of RockyMount, Inc., 573 Pa. 637. 646-47 (Pa. 2003) (internal citations omitted). However, this requirement is not the equivalent of stating that no factual disputes exist between the parties. *See All-Pak, Inc. v. Johnston*, 694 A.2d 347, 350 (Pa. Super. 1997). The proper question is not whether the party seeking the preliminary injunction is guaranteed to prevail, but whether it produced sufficient evidence to show that "substantial legal questions must be resolved to determine the rights of the respective parties." *Id.*

A. Plaintiffs are Likely to Succeed on the Merits of their Claims

Based on the Pennsylvania Supreme Court's decision in *Theodore v. Delaware Valley School District*, 575 Pa. 321, 836 A.2d 75 (Pa. 2003), Plaintiffs are likely to succeed on the merits of their claim and have a clear right to relief. The Court in *Theodore* required DVSD to show a specific need for a nearly identical drug testing

policy and provide "an explanation of its basis for believing that the policy would address that need." *See Theodore*, 836 A.2d at 92. Approximately eight years after *Theodore* was decided, DVSD has still not shown either a specific need for the policy or a basis for believing that the policy would address a prevalent drug problem within the District.

At the hearing on the Preliminary Injunction, DVSD Superintendent Candice Finan was called to testify. Dr. Finan explained that DVSD implemented the Policy in 1998 after hearing concerns from community members about "widespread drug use" in the schools. *See* N.T., 6/13/11, p. 37. There was also a "public outcry" over a heroin sale on campus in 1998. *See id.* Dr. Finan further testified that she and other members of the school board listened to estimates from a local police chief who estimated that 35 to 40% of DVSD high school students were using heroin. *See id.* at 46. A drug and alcohol counselor at the school said she thought that 65% of students were using heroin. *See id.* at 47. In reaction to this "public outcry," the DVSD board implemented the drug and alcohol testing policy for all students who wished to participate in extracurricular activities, athletics, or who wished to park at the school.

The Policy does not list any data about drug use, nor does it specify that there is a drug problem or persistent drug use in Delaware Valley. The Policy only states that,

> Deterring drug use by school students is important. School years are the time when physical, psychological, and addictive effects of drugs are most severe . . . With regard to school athletes and student drivers, the risk of immediate physical harm to the drug and alcohol user or those with whom s/he is playing a sport or sharing the highway is particularly high . . . Co-curricular participants, whether athletes or not, are student leaders and, as such, serve as role models for their peers and for young children as well. The use of drugs and alcohol by these role models exacerbates the problem of illegal substances in our schools.

See Policy 227.1, p. 1. Dr. Finan testified that she and the Board believed that there was a drug problem in the school district based on confidential student surveys and statements made by the student council president at the time, who attended one of several town hall meetings in 1998 when the Board was debating about implementing a drug testing policy and stated that kids were shooting up heroin in the bathrooms. *See* N.T. 6/13/11, at 52-53.

However, this evidence may not provide sufficient evidence to support the conclusions regarding drug use in the District. Plaintiffs submitted to the Court a 1998 diagnostic study regarding, *inter alia*, student attitudes about drug use and rates at which drugs were consumed based on the grade level of the students. *See* Plaintiffs' Exhibit 2. DVSD also submitted expulsion and enrollment numbers from 1995-2011. *See* Plaintiffs' Exhibit 4. While the diagnostic study breaks down student responses by grade level, it does not show any special risk for students in athletics, extracurricular activities. In fact, the survey does not even attempt divide students into these groups. Regarding the expulsion/enrollment numbers, the submitted chart only indicates how many expulsions for a given school year were related to drugs and/or alcohol. It does not indicate how many, if any, of the students were involved in athletics, extracurricular activities, or how many students expelled had parking permits at the high school.

There is also no evidence presented that Policy 227.1 is an effective method of deterring drug use within the District. The expulsion/enrollment number chart shows no discernable pattern between the number of drug/alcohol related expulsions following the implementation of the Policy in 1998 and how many drug and alcohol expulsions occurred in the 1995-96, 1996-97, and 1997-98 school years, before the drug testing

policy was implemented. *See* Plaintiffs' Exhibit 4. For example, in the three years prior to the implementation of the Policy the drug/alcohol expulsions were seven students, two students, and seven students, respectively. In the three years following the implementation of the Policy the drug/alcohol expulsions numbers were three students, one student, and eleven students, respectively. In the three most recent years of the chart, fifteen students were expelled for drugs/alcohol in the 2008-09 school year, eight students in the 2009-10 school year, and one student in the 2010-11 school year. *See id.* Again, there is nothing presented that indicates how many, if any, of these students were subject to drug testing under Policy 227.1 for their participation in athletics, extracurricular activities, and/or school parking. Further, DVSD was unable to point to any specific data that measures specific drug use levels for athletes, participants in extracurricular activities, or student drivers within DVSD. *See id.* at 72-73.

Given the specific criteria set for by the Pennsylvania Supreme Court in *Theodore*, the lack of evidence that DVSD has a "special need for drug testing" or a basis for believing the drug testing policy would address such a need, the evidence presented at the hearing on the Preliminary Injunction falls short of the requirements set forth in *Theodore*. Accordingly, Plaintiffs have demonstrated that they have a clear right to relief.

B. Immediate and Irreparable Harm to Plaintiffs

Plaintiffs have also shown that relief is necessary to prevent them from suffering continual irreparable harm as a result of DVSD's drug and alcohol testing policy. Harm is "irreparable" when "it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." *Ambrogi v. Reber*, 932 A.2d 969, 978, n. 5

(Pa. Super. 2007). In order to satisfy this element, it must also be shown that the alleged harm is reasonably certain to occur. *See Richman v. Mosites*, 704 A.2d 655, 659 (Pa. Super. 1997). "Equity will enjoin action when there is substantial threat of injury, without waiting for the injury to be inflicted." *Air Products and Chemicals, Inc. v. Johnson*, 422 A.2d 114, 1122 (Pa. Super. 1982). Irreparable harm is established where an alleged deprivation of a constitutional right is at issue. *See Henry v. Greenville Airport Commission*, 284 F.2d 631, 633 (4th Cir. 1960). The loss of a fundamental constitutional freedom cannot be quantified, calculated or recovered so such a loss is irreparable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (deprivation of federal First Amendment freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury").

This case involves a fundamental right—that of the Plaintiffs' privacy. Plaintiffs in this matter are forced into making an unconstitutional choice between not participating in extracurricular activities, sports, or parking at school and allowing DVSD to violate their privacy. Plaintiffs have already suffered by not participating in activities of which they are interested because they choose not to submit to DVSD's drug and alcohol testing program.

While the Court acknowledges that DVSD views extracurricular activities and driving to school as a privilege, "extracurricular activities are 'voluntary' in the sense that they are not required for graduation, they are part of the school's educational program; for that reason, the [School District] is justified in expending public resources to make them available." *Board of Education v. Earls*, 536 U.S. 822, 845 (2002) (Ginsburg, J., dissenting). School activities are "essential in reality for students applying to college

and, for all participants, a significant contributor to the breadth and quality of the educational experience." *Id.* In fact, school officials recognized that co-curricular activities are important because they enhance team building and teach conflict resolution and social skills. *See* N.T. 6/13/11, p. 85. Further, testimony also established that co-curricular activities can develop students' talents that may not necessarily be seen within the classroom environment and they develop leadership skills. *See id.* Finally, there are some scholarship opportunities that are closed to those who do not participate in co-curricular activities. *See id.*

Further, while DVSD may view its student athletes and extracurricular participants as role models, the Court in *Theodore* rejected the premise "that it is constitutionally reasonable to target and make an example of some students, not because of an existing drug or alcohol problem or because they are more likely than others to have or develop one, but because... they are assumed the mantle of 'student leaders' and 'role models.'" *Theodore*, 836 A.2d at 95. The Court also noted that electing to participate in school activities by itself does not justify "intrusive, suspicionless searches." *Id.* at 96. The Pennsylvania Supreme Court therefore determined that forcing potentially innocent students to choose between school activities and their right to privacy under the Pennsylvania Constitution is not warranted without a strong justification for such a policy. *See id.* at 95-96.

As previously discussed, DVSD has not provided a verifiable justification for Policy 227.1. By requiring its students over the past twelve years to continue to make a choice between participating in extracurricular activities by sacrificing their privacy rights and not participating in these beneficial activities at all, DVSD is forcing a difficult

choice upon its students. The Pennsylvania Supreme Court has directed that without such justification the policy mandating such a choice is unconstitutional and a source of a continuing and irreparable harm. DVSD has not yet presented solid evidence that this policy has been effective at deterring or curbing drug use amongst its students and therefore cannot now say that harm will result if the mandatory drug and alcohol testing program is stopped. Accordingly, granting the Preliminary Injunction in favor of Plaintiffs outweighs any potential harm that would be suffered by DVSD by the issuance of an Injunction, which would be minimal at most.

C. Status Quo and Reasonableness of the Preliminary Injunction

Granting Plaintiffs' Motion for a Preliminary Injunction will restore the parties to the status quo that existed before the drug and alcohol testing policy was instituted in 1998 and re-adopted in 2006. By enjoining further enforcement of Policy 227.1 by DVSD, Plaintiffs and all students may participate in athletics, extracurricular activities, and may park at school without having their privacy rights violated by being subject to drug and alcohol testing. Granting a Preliminary Injunction in this matter is a reasonable exercise of this Court's equitable powers. While DVSD may still present evidence sufficient to support its policy as this matter proceeds, the Pennsylvania Supreme Court ruling in *Theodore*, together with the lack of specific evidence presented thus far in this proceeding, mandates a decision in favor of protecting privacy rights under the Pennsylvania Constitution.

D. Protecting the Public Interest

Addressing the final provision set forth in *Summit Town Centre, Inc. v. Shoe Show of RockyMount, Inc.*, granting the Preliminary Injunction will not negatively affect the

public interest. Rather, the public interest will be enhanced by protecting the privacy interests of DVSD students.

As demonstrated above, Plaintiffs have shown a strong likelihood of success on the merits of their claim based on the Pennsylvania Supreme Court's holding in *Theodore*. DVSD has failed to show a solid reason for Policy 227.1, or data to support targeting participants of extracurricular activities, athletes, and student drivers for drug and alcohol testing. The constitutional rights of students in DVSD heavily outweigh a drug testing policy that has little statistical data to support its existence. Granting the Plaintiffs' request for a Preliminary Injunction in this matter certainly does not harm the public interest. Rather, it will protect it.

III. Conclusion

In conclusion, we find that Plaintiffs have satisfied their burden and are entitled to a Preliminary Injunction in this matter. Accordingly, pending further proceedings in this matter, the Delaware Valley School District is preliminarily enjoined from enforcing the initial testing and random testing provisions of DVSD Drug and Alcohol Policy 227.1, requiring students to submit to drug and alcohol tests before being allowed to participate in extra or co-curricular activities, athletics, or being allowed to park on school property. However, the provisions of Policy 227.1 concerning, *inter alia*, voluntary testing and reasonable suspicion testing of students shall remain in effect.

BY THE COURT:

Honorable Joseph F. Kameen, P.J.

cc: Mary Catherine Roper, Esq.
Michael J. Salimbene, Esq.
William J. McPartland, Esq.
Court Administration

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