

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

M.K. & A.K., minors, by and through
their parents, GLENN & KATHY
KIEDERER,

Plaintiffs,

vs.

THE DELAWARE VALLEY SCHOOL
DISTRICT,

Defendant.

No. 434 – 2011 Civil

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PIKE COUNTY, PA

ORDER

AND NOW, this 21st day of January, 2014, following a Non-Jury trial in this matter, it is this Court's determination that Delaware Valley School District's Policy 227.1 as adopted in 1998 and amended in 2006 is constitutional. Therefore, this Court enters a verdict in favor of the Defendant, Delaware Valley School District and Plaintiff's requests for a determination that the policy is unconstitutional and for injunctive relief are hereby **DENIED** and the previously issued Preliminary Injunction Order is **VACATED**.

FINDINGS OF FACT

Plaintiffs, M.K. & A. K. are students at Delaware Valley School District subject to Policy 227.1 Defendant, Delaware Valley School District ("District") implemented Policy 227.1 in 1998 and amended it in 2006.

Policy 227.1 applies to students in the District's middle schools and high school who participate in co-curricular programs including but not limited to athletics and those who have been given permission by school officials to drive to school and/or have been

issued a parking permit. *Plaintiff's Exhibit 1* at 3. Under Policy 227.1 there are five (5) types of drug tests: initial testing, random testing, reasonable-suspicion testing, return-to-activity testing and follow-up testing. *Id.* Further, under Policy 227.1 students cannot participate in the co-curricular programs or hold a school driving permit without consenting to the drug testing. *Id.* at 2-3.

The purpose of Policy 227.1 is to: (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 accident and injuries, resulting from the use of alcohol or controlled substances; and (4) provide drug and alcohol users with assistance programs. *Id.* at 1-2.

The District implemented Policy 227.1 in 1998 after it was determined that a drug issue had developed in the school district. Dr. Finan, former Superintendent of Delaware Valley School District specifically testified to certain procedures followed in 1998 prior to the adoption of the drug policy being challenged in this matter. In 1994, the District was awarded a "Drug Free" award for the low level of drug usage in the school district. However, in 1996, a significant increase in drug use began to occur. Then in 1998 a heroin arrest occurred at Delaware Valley. A student was arrested and convicted of selling heroin in a bathroom at the high school. Two other students were also involved in the incident and two of the three students were active in sports and co-curricular activities.

Serious public concern developed in the community and three town hall meetings were held. Panels of drug and alcohol experts, law enforcement, and mental health professionals were made available at the community meetings to provide information and

answer questions of the board members, administration and public regarding the drug issues in the school. Additionally, the student council president spoke at at least one of the meetings and stated that drugs were rampant throughout the school district. Further, Dr. Finan testified that her children would not go to the bathroom at school because there were drugs there. The high level of concern led to the District requesting that a study be conducted regarding the drug use in the school district.

The District had Diagnostics Plus, located in State College Pennsylvania conduct a study and survey of the drug use in the school district. The study was based on primary prevention awareness, attitude and use surveys resulting from self-reported data from students in the school district. The study was conducted from December 1997 to June 1998 and then presented to the school board. The study evaluated the drug use in the Delaware Valley School District from grades 7 through 12 and compared it to drug use throughout the state.

The Diagnostics Plus showed drug use in grades 7 through 12 at Delaware Valley was higher than the state average for several of the drugs identified in the study.

After the adoption of the policy in 1998, in 2006 certain amendments were made to the policy to address new drug problems. The 2006 amendments added additional drugs for testing as a result of drug abuse problems related to prescription drugs, bath salts and synthetic marijuana which did not exist in 1998. Additionally, the 2006 amendments changed the term "extra-curricular" to "co-curricular."

Certain information related to drug deaths of Delaware Valley students associated with serious drug abuse or driving while under the influence was also presented. Additionally, the Matamoras Police Chief Mitchell testified to the very high percentage

of drug use among students and at one point told the committee that 35% to 40% of the students at Delaware Valley were using heroin. Further, Dr. Finan testified that because most of the parents work outside of the community, primarily in New York and New Jersey, students are more involved in activities.

Throughout the trial numerous individuals testified regarding their involvement with the drug testing program and subsequent results. Elaine Tucker, the drug abuse consultant utilized by the District in 1998 and 2006, testified regarding her involvement in the proceedings related to the initial adoption of Policy 227.1 and the amendments in 2006. In 1998 Ms. Tucker was on the panel of experts during the town hall meetings that provided information to the school and public. She indicated that she was involved in treatment of students engaged in the abuse of drugs throughout the relevant period of time and based upon her specific involvement in the field of drug abuse treatment had predicted that 65% of the students at Delaware Valley would be involved in drug or alcohol abuse. Additionally, a recall of her review of the spreadsheets created by Dolores Brennan indicated drug incidents with yearbook, odyssey of the mind, orchestra, band, scholastic bowl, basketball and football. Since the enjoining of the policy many drug incidents occurred with basketball, wrestling, yearbook, football, field hockey, drama, and soccer.

Similarly, Dolores Brennan, John Tucker, Joseph Casmus and Sue Casey, all testified to their involvement regarding the adoption of the policy and the subsequent effects. Ms. Brennan was a health and physical education instructor at the school and was chairperson of the Student Assistance Program (SAP) throughout this period. SAP is a program students were referred to for a number of reasons, including drug and alcohol

problems. She had personal knowledge of the drug situation at the school and was involved in the assistance to students having drug and alcohol problems. Ms. Brennan created detailed records of the students referred to SAP because of drug problems from the period of 1994 until the present. However, these records did not reflect if the students were involved in extracurricular activities or had driving privileges. However, Ms. Brennan did attempt to add this information to the records from her memory of what activities the affected students may have been involved in. Between the years 1998 and 2010-2011, football, basketball, track and field, drama club, VICA, HOSA, driving, odyssey of the mind, and vocational instruction had issues with drug use. After the policy was enjoined, there were drug problems with wrestling, field hockey, basketball, drama, soccer and yearbook.

John Tucker was a guidance counselor at the high school until 2011 and involved with the creation of the SAP program in 1989 as well as the subsequent participation in the SAP program. Counselor Tucker testified to his knowledge of drug activity in the school during his tenure as well as the correlation of drug use and extracurricular activities. While he had no specific knowledge of the percentage of SAP participants involved with such activities, he recognized the correlation between abusers and athletes, etc. Prior to 1998, he recalls incidents with soccer players, drivers, football players, basketball players, swimmers, and cheerleaders. Between 1998 and 2011, there were also problems with VICA, HOSA, honor society and other groups. Further, he was aware of the deterrent effect of the policy on drug use by those students who wanted to participate in activities since they did not want to test positive and lose their ability to participate.

Joseph Casmus, Principal of 11th and 12th grade provided testimony regarding the

original adoption of the drug policy, the town hall meetings and the purpose of the policy. Principal Casmus indicated the policy was implemented to deter drug use by requiring testing and to create a pathway to drug treatment for those who tested positive. Principal Casmus also provided testimony based upon his involvement with students that the policy gave students a way to overcome peer pressure to use drugs since participation in activities was major factor for many students.

Sue Casey, School Board member and former School Board President, testified that much of the information contained in the Diagnostics Plus report was available to the Board during their discussion and consideration of the drug policy. This information, including the graphs and comparisons of Delaware Valley to the state averages, was presented to the Board by the Superintendent at that time. She also testified that she did not support the policy in 1998 since she believed that it was the parents' job, not the school's job, to monitor the students for drug use. However, when the policy was evaluated in 2006 she supported the amendments and re-adoption of the policy given its success in the past. Ms. Casey testified to the nature of the town hall meetings conducted during the time when the policy was being drawn up and considered. That testimony included detailed information for drug and alcohol participants, law enforcement, mental health officers as well as specific information she received from friends, associates and family members regarding availability of drugs to and use of drugs by students.

Finally, the District presented David Evans as an expert in the field of drug testing policies in schools. David Evans was accepted as an expert related to the policies and procedures involved in such drug testing as well as the affect that such testing has on students in schools. David Evans is an attorney involved in school drug testing policies

for many years; was named Executive Director of "Drug Free Schools" in 1998; authored a book on such drug testing (two volumes) published by West; is a member of the National Student Drug Testing Committee; assisted Hunterdon Central High School in New Jersey in implementing a drug testing policy that is now recognized as a national example of such a policy. Further, Attorney Evans presents lectures across the nation on school drug testing and the national model from Hunterdon. Given the witness' extensive knowledge and involvement in the development and implementation of drug testing procedures as well as the effect of those procedures on students, the Court accepted him as an expert witness on matters related to the adoption, implementation and effect of the District's drug testing procedures.

Detailed reports from Attorney Evans were admitted into evidence regarding the District's policy related to its initial procedures prior to adoption, the collection of necessary data, the specific details of the policy, the actual testing procedures and the stages of testing necessary to verify accuracy of results. Further, Attorney Evans indicated that the District's policy was very similar to the Hunterdon example and all steps taken by the District were proper regarding the implementation of the policy. Finally, Attorney Evans testified regarding the deterrent effect of random drug testing and stated that the District's policy was better than the average testing policy utilized in most schools.

CONCLUSIONS OF LAW AND ANALYSIS

The decision in this case is guided by the Supreme Court's holding in *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2003) as well as the decisions in *Joyce v. Hunterdon Central Regional High School Board of Education*, 826 A.2d 624

(N.J. 2003) and *Veronica School District 47J v. Acton*, 515 U.S. 646 (1995). In *Theodore* the Supreme Court held that a three part test must be satisfied in order for a suspicionless search policy to be held constitutional. *Theodore*, 836 A.2d at 96. The District must show (1) sufficient proof that there is an actual drug problem in the school district; (2) individualized proof that the targeted students are likely part of the drug problem that exists; and (3) reasonable proof that the policy actually addresses the drug problem. *Id.*

The Pennsylvania Supreme Court further illustrated that a drug testing policy similar to the one upheld in *Joyce* would likely prevail. *Id.* at 95. The program in *Joyce* was developed as a result of a documented drug problem. *Joyce*, 826 A.2d at 627, 645-46; *See also Theodore*, 836 A.2d at 93. Surveys of students were conducted and certified statements were taken from school personnel describing first-hand experiences with students using drugs and alcohol. *Joyce*, 826 A.2d at 627, 645-46; *See also Theodore*, 836 A.2d at 93. The New Jersey Supreme Court in *Joyce* upheld the program because “it represented a rational attempt by those officials and by approving parents to address a documented problem of illegal drug and alcohol use affecting a sizable portion of the student population.” *Id.* at 697; *See also Veronica*, 515 U.S. 646 (where the United States Supreme Court upheld a drug testing policy that was adopted in response to a well-documented drug problem in the high school which targeted students engaged in voluntary interscholastic athletics because they were a major source of the drug problem).

THE DISTRICT HAS ESTABLISHED SUFFICIENT PROOF OF AN ACTUAL DRUG PROBLEM

The evidence presented at the non-jury trial was specific as it relates to the various requirements of the *Theodore* criteria. The evidence presented in this case clearly

established that an actual well-documented drug problem existed when Policy 227.1 was enacted in 1998 and amended in 2006. Specifically, Dr. Finan testified that in 1994 the school was recognized and awarded a "Drug Free" award for its recognized low level of drug usage at the school. However, a change in the drug usage in the community in the mid 1990's triggered a significant increase in drug use at the Delaware Valley schools.

In 1996, the school brought drug dogs into a middle school and the dogs had 21 "hits" at lockers. Further, certain parents admitted to smoking marijuana in the presence of their kids. Then in 1997, a grand jury in Lackawanna County heard evidence of increasing heroin abuse and overdose deaths involving students. Ultimately in 1998, a student was arrested and convicted of selling heroin in the bathroom of the Delaware Valley High School and two other students were involved in this incident. Two of these three students were involved in sports and co-curricular activities at the school. As a result of this incident, serious public concern from parents developed regarding the drug usage in the school district.

After this incident and prior to the enactment of Policy 227.1 the District conducted detailed studies including collecting factual information about drug use in the school from students, parents, teachers and counselors. Much of the information the District received also came from several town hall meetings. The meetings were conducted to elicit information from concerned citizens, students, law enforcement and staff members. During one of these meetings the president of the student council indicated that drugs were everywhere in the school and were being sold in the bathrooms. Panels of drug and alcohol experts, law enforcement, and mental health professionals were made available to provide information and answers to questions from board

members, administration, and the public regarding the use of drugs at the school and the threat that drugs posed to drug users and others in the school.

Evidence was also presented from Police Chief Mitchell who stated 35% to 40% of the students were using heroin. Further, certain information related to drug deaths of Delaware Valley students associated with serious drug abuse or driving while under the influence was also presented.

The rise in concern prompted the District to instruct Diagnostics Plus to conduct a detailed survey of the drug usage in the school from 7th through 12th grade and compared that usage to statewide school usage. The study was conducted between December 1997 and June 1998 and then the results were presented to the board. Even though the final printed study was not available until after the policy was actually adopted, most of the information contained therein was presented to the Board prior to June 1998. This survey was entered as Plaintiff's Exhibit 3 and Appendix C which contained the comparisons of the Delaware Valley School District with the results of five biennial statewide surveys was entered as Plaintiff's Exhibit 4. Table 4 of Plaintiff's Exhibit 4 indicates the following substance abuse at Delaware Valley was higher than the state average:

12th grade monthly, weekly and past 30 day use of marijuana; 6th grade stimulant use; 6th grade depressant use; 6th grade cocaine use; 12th grade cocaine use; 7th grade crystal methamphetamine use; 12th grade crystal methamphetamine use; 6th grade designer drug use; 9th grade designer drug use; 6th grade crack cocaine use; 12th grade crack cocaine use; 6th grade heroin use; 9th grade heroin use; 12th grade heroin use; and use of injected drugs by 6th, 9th, and 12th grade.

Plaintiff's Exhibit 4, Table 4, pgs. 6-7.

Additionally the data showed 20.8% of 12th graders reported smoking marijuana

and driving which was 7.6% above the state average. *Plaintiff's Exhibit 4, Table 5*, pg. 9. Further, 31.5% of 12th graders reported they rode with a marijuana smoker, a figure that was 8.5% above the state average. *Id.*

A review of the Diagnostics Plus report including the results of the student survey related to substance abuse contained on Tables 1 through 4 clearly evidences a generally higher percentage of drug use at Delaware Valley than the average across the state.

Plaintiff's Exhibit 4. In addition, Table 5 indicates a higher than state average of "driver/passenger risks" related to drug and alcohol use by drivers. *Plaintiff's Exhibit 4, Table 5*, pg. 9.

Based upon the evidence available in June of 1998, the District had sufficient information regarding a growing rate of drug use in the Delaware Valley school system, a rate which appeared to exceed the state average, and a rate which placed students at a higher risk of injury from personal abuse of substances or from injury by others using the substances.

Evidence was also presented to identify certain amendments to the policy made in 2006 which added additional drugs for testing based upon the recognition of abuse problems for prescription drugs, bath salts and synthetic marijuana which did not exist in 1998. Ms. Tucker indicated that she actively participated in treatment of students involved in the abuse of drugs throughout the relevant period of time. She participated in the town hall meetings in 1998, was part of the panel of experts providing information to the school and public, and based upon her specific involvement in the field of drug abuse with students had predicted that 65% of the students at Delaware Valley would be involved in drug or alcohol abuse. Monitoring of the policy for its effects on the students

as well as the drug use in the school and amending the policy to include "new" drugs that appeared after the policy was enacted was proper.

**THE DISTRICT ESTABLISHED THAT THE TARGETED STUDENTS ARE
LIKELY PART OF THE DRUG PROBLEM**

The evidence presented also clearly establishes the targeted students are likely to be part of the drug problem. Dr. Finan noted that most parents work outside of the community which results in more students being involved in activities. Dolores Brennan, John Tucker, and Elaine Tucker, also testified to specific knowledge they had regarding the students who were part of the drug problem.

Ms. Brennan as health and physical education instructor and more noteworthy chairperson of SAP had personal knowledge of the drug situation at the school and was involved in the assistance to students having drug and alcohol problems. She testified that the school kept detailed records of all those referred to SAP throughout the period from 1994 to the present but did not keep a record of the extracurricular activities or driving privileges of the students involved. She did try to add to the records from her memory what activities the affected students may have been involved with. She did her best to identify those involved in such activities but other witnesses testified that there was a higher number of SAP individuals involved in such activities than Ms. Brennan was able to recall. However, Ms. Brennan was able to recall that between the years 1998 and 2010-2011, football, basketball, track and field, drama club, VICA, HOSA, driving, odyssey of the mind, and vocational instruction had issues with drug use. She also indicated that after the policy was enjoined, there were drug problems with wrestling, field hockey, basketball, drama, soccer and yearbook.

Counselor John Tucker also testified to his knowledge of drug activity in the school during his term there as well as the correlation of drug use and extracurricular activities. Although he did not have specific knowledge of the percentage of SAP participants with such activities, he recognized the correlation between abusers and athletes, etc. In particular, he indicated that prior to 1998 drug related incidents occurred with soccer players, drivers, football players, basketball players, swimmers and cheerleaders. Further he indicated that between 1998 and 2011 drug related issues also occurred with VICA, HOSA, and the honor society.

Finally, Elaine Tucker who reviewed the spreadsheets created by Ms. Brennan testified that she recalled drug related incidents with yearbook, odyssey of the mind, orchestra, band, basketball, football, and scholastics bowl. Further, she testified that since the policy was enjoined basketball, football, drama, soccer, wrestling, yearbook, and field hockey all developed drug related problems. Further, Ms. Tucker was also aware that HOSA and driving also had drug issues even though they were not listed on the spreadsheet.

Based upon the evidence presented the District clearly had sufficient information indicating students involved in co-curricular activities and those with driving privileges were part of the drug problem. Two of the individuals involved in the initial arrest were involved in sport and co-curricular activities. Further, the evidence presented via the spreadsheets and district witnesses demonstrates it is reasonable for the District to test all athletes and participants in co-curricular activities.

**THE DISTRICT HAS ESTABLISHED THAT POLICY 227.1 IS AN EFFECTIVE
MEANS OF COMBATING THE DRUG PROBLEM**

Finally, the District demonstrated that Policy 227.1 is an effective means of combating the drug problem. The purpose of Policy 227.1 was meant to deter students from drug use. Principal Casmus, testified about the original adoption of the drug policy and specifically indicated the purpose of the policy was to deter drug use by requiring testing and to create a pathway to drug treatment for those who tested positive. Principal Casmus also provided testimony based upon his involvement with students that the policy gave students a way to overcome peer pressure to use drugs since participation in activities was major factor for many students. Further, evidence was presented that students who tested positive for using drugs or who were otherwise determined to be drug users based upon possession of drugs were to be evaluated for participation in SAP which was effective in assisting the students with their drug and alcohol problems.

Counselor John Tucker and Sue Casey each testified about the actual effects Policy 227.1 has had on the drug problem. Counselor John Tucker testified that he was aware of the deterrent effect of the policy on drug use by those students who wanted to participate in activities since they did not want to test positive and lose their ability to participate.

Sue Casey testified that she did not support the policy in 1998 since she believed that it was the parents' job, not the school's job, to monitor the students for drug use. However, when the policy was re-evaluated in 2006 she supported the amendments and re-adoption of the policy given its success in the past.

Finally, the District had its policy evaluated by an expert in the field of school

drug testing policies to insure it was reasonable and effective. The District implemented a testing policy that meets criteria for properly performing and verifying test results before the results are made available to the District for use in requiring counseling and restricting participation in extracurricular activities. Attorney David Evans testified as an expert in the field of drug testing policies in schools and was accepted as an expert related to the policies and procedures involved in such drug testing as well as the affect that such testing has on students in schools.

Attorney Evans' detailed reports examined the District's policy relating to its initial procedures prior to adoption, the collection of necessary data, the specific details of the policy, the actual testing procedures and the stages of testing necessary to verify accuracy of results. *See Defendant's Exhibits 3 and 4.* Attorney Evans indicated that Policy 227.1 was very similar to the Hunterdon drug testing example, a policy previously upheld by the New Jersey Supreme Court. *See Joyce v. Hunterdon Central Regional High School Board of Education*, 826 A.2d 624 (N.J. 2003).

Additionally, Attorney Evans testified that a reasonable drug testing policy would include a number of elements, including a community task force, data gathering, written policies and procedures, a quality drug testing process, appropriate specimen collection, screening tests, use of medical review officer, use of the SAP process and confidentiality. He indicated that the initial town hall and school board meetings were properly conducted to educate the board and public regarding the necessity of such drug testing. Further, the actual collection of data from Diagnostics Plus as well as from the public, staff, law enforcement, etc. was properly conducted to generate real information to support the need for such testing. Finally, the actual steps involved in the testing

procedure including the testing process (use of the federal testing program) and the verification stages of testing to insure accuracy were all as recommended as the proper steps for adoption of a drug testing policy.

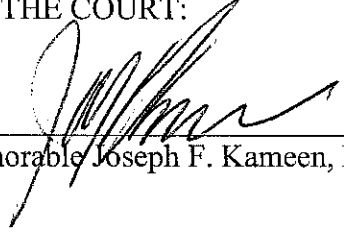
Finally, Attorney Evans testified that random testing does deter drug use by students and that evaluations of drug use prior to and after implementation of such policies demonstrated that conclusion. Based upon his analysis of Policy 227.1, Attorney Evans concluded that the policy as implemented was better than the average testing policy utilized in most schools.

Thus, based upon all of the evidence the District sufficiently established that Policy 227.1 is an effective means of combating the drug problem. The District has shown through witnesses and an expert in the field not only that studies demonstrate the effectiveness of such policies but specifically at Delaware Valley it is combating the problem. The evidence presented demonstrates compliance with the criteria set for in *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2003).

CONCLUSION

Based on the foregoing reasons, this Court concludes that the District's Policy 227.1 as adopted in 1998 and amended in 2006 is constitutional. Further, this Court concludes that even though a Preliminary Injunction was previously issued due to the lack of sufficient evidence being presented at the Preliminary Injunction hearing, the evidence now presented demonstrates the constitutionality of Policy 227.1. Therefore, the Preliminary Injunction issued on July 21, 2011 is hereby **VACATED**.

BY THE COURT:


Honorable Joseph F. Kameen, P.J.

cc: Mary Catherine Roper, Esq.
Ken Halloway, Esq.
William McPartland, Esq.

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